88-424

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

EMERYVILLE TRUCKING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STUART A. WILLIAMS
ECKERT SEAMANS CHERIN
& MELLOTT
600 Grant Street, 42nd Floor
Pittsburgh, PA 15219
(412) 566-6000

Counsel of Record

QUESTIONS PRESENTED

I. Joint Employer—National Labor Relations Act

A. Whether the agent which supervises its principal's employees in a manner compelled by the principal and for the benefit of the principal may be found to be a joint employer of the principal's employees.

B. If so, whether the General Counsel for the National Labor Relations Board may execute a settlement agreement with the principal which imposes primary liability for unfair labor practices committed by the joint employer solely upon the agent.

II. Burden of Proof—Unfair Labor Practices—National Labor Relations Act

A. Whether, absent any evidence of discriminatory anti-union motivation for a business decision, the burden may be placed on the employer to prove that the timing of the decision was not accelerated by the employer's prior unfair labor practice.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, Emeryville Trucking, Inc., and the respondent, National Labor Relations Board.

Petitioner Emeryville Trucking, Inc. discloses the following corporate affiliates:

1. Team Transport, Inc.
2. Team Brokerage Services, Inc.
3. Emeryville Trucking Co.
4. Rezzetano Investments

The Respondent before this Court is the National Labor Relations Board.

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OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Third Circuit (Mansmann, J.) has not been reported. It is reprinted in the appendix hereto, p. 91a, *infra.*

The supplemental decision and order of the National Labor Relations Board is reported at 285 N.L.R.B. No. 132, and is reprinted in the appendix hereto, p. 76a, *infra.* The decision and order of the National Labor Relations Board is reported at 278 N.L.R.B. No. 153, and is reprinted in the appendix hereto, p. 38a, *infra.*

JURISDICTION

Invoking its jurisdiction under 29 U.S.C. § 160, the respondent National Labor Relations Board ("Board") issued a complaint alleging that the petitioner Emeryville Trucking, Inc. ("Emeryville") "and/or" Helms Express had committed unfair labor practices within the meaning of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("Act").[1] On March 24, 1986, the Board issued a Decision and Order, finding certain violations of the Act. *See* p. 38a, *infra.* On September 24, 1987, the Board issued a Supplemental Decision and Order, finding additional violations of the Act. *See* p. 76a, *infra.*

On the Board's application for enforcement and Emeryville's cross-application for review, the Third Circuit on May 11, 1988, entered a judgment and an opinion

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[1]As will be discussed *infra,* Helms Express was subsequently dismissed from the case as a result of a settlement agreement with counsel for the Board's General Counsel.

enforcing the Board's Decision and Order, as supplemented. *See* p. 91a, *infra*. Emeryville's petition for rehearing or rehearing in banc was denied by the Third Circuit on June 9, 1988. *See* p. 96a, *infra*.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 151 *et seq.* National Labor Relations Act.

[The full text of the National Labor Relations Act is reprinted in the appendix hereto, p. 1a, *infra*.]

STATEMENT OF THE CASE

Background

Emeryville owns a fleet of tractor-trailer vehicles that it leases to various common carriers for use in the freight hauling business. Beginning in 1979, Emeryville leased its fleet of trucks to the Astro Division of Helms Express. Each tractor-trailer unit was covered by a separate written equipment lease which stated:

> The equipment which is the subject of this Lease shall be driven by an employee of [Helms Express] at all times that it is in the service of [Helms Express]... [Helms Express] expressly reserves the right to control the manner, means, and details of, and by which the driver of such leased Equipment performs his services, as well as the ends to be accomplished.

Accordingly, Helms Express hired and employed the drivers of the leased equipment.

In addition to the equipment leases, Emeryville and Helms Express entered an agency agreement. Among other

things, Emeryville agreed, as an agent of Helms Express, to manage the Helms Express freight terminal located at Warrendale, Pennsylvania. The agency agreement required Emeryville:

> To comply with all the rules, policies, and procedures from time-to-time established by [Helms Express] including, but not limited to, the control of drivers' logs, the verification of hours of service, and inspection of vehicles.
>
> * * *
>
> To advance to drivers not more than the percentage of revenue and/or other maximum amount as (Helms) may from time-to-time prescribe.
>
> * * *
>
> [T]o make no commitment . . . to any driver applicant regarding employment without the express prior approval of [Helms Express].

The agency agreement was terminable by either party at any time.

Terms and conditions of employment for the Helms Express drivers, who were members of Teamsters Local Union No. 800, were governed by the National Master Freight Agreement ("NMFA"). Helms Express negotiated and signed the NMFA. Emeryville neither negotiated nor signed the NMFA. Prior to the instant case, grievances arising under the NMFA were filed with, processed by, and defended by Helms Express.

Emeryville, as agent of Helms Express, performed ministerial tasks related to the Helms Express drivers. Thus, Emeryville dispatched drivers as provided in the NMFA; distributed Helms Express payroll checks; issued

monies for sick and vacation days as provided in the NMFA from a fund created by Helms Express; and, accepted employment applications and hired probationary employees subject to the final approval of Helms Express.

The Emeryville-Helms Express Relationship

In 1980-81, the business relationship between Emeryville and Helms Express deteriorated significantly. Among other things, Helms Express announced (and then rescinded) a decision to close a freight terminal at Gary, Indiana, which Emeryville managed pursuant to the agency agreement; opened a second freight terminal at Gary, Indiana in violation of the agency agreement and in competition with the Emeryville-managed terminal; unilaterally and without purported justification withheld three percent of the lease payments due to Emeryville pursuant to the equipment leases; and, deducted from the equipment lease payments due to Emeryville the amount of two grievance awards owed by Helms Express pursuant to the NMFA.

In an effort to resolve the differences between Emeryville and Helms Express, Emeryville agreed to permit Helms Express to operate the second Gary freight terminal. In exchange, Helms Express agreed to pay Emeryville a one percent commission on the second terminal's revenues and guaranteed that the second terminal would not solicit existing customers of the Emeryville-managed terminal. Helms Express reneged on both of these promises and refused to execute a written agreement embodying them.

The Packer Grievance and the First Round of Lease Cancellations

In early 1981, Helms Express employee Melvin Packer ("Packer") filed a grievance with Helms Express alleging a violation of the NMFA. Specifically, Packer protested that the Emeryville dispatcher acting as Helms Express' agent at the Warrendale terminal directed him to "dead-head" (operate his tractor-trailer without a load on board) from Detroit, Michigan to Warrendale.

Packer successfully pursued his grievance under the NMFA. However, Helms Express refused to pay the award, referring Packer to Emeryville. When Packer appeared at Emeryville on September 14, 1981, Emeryville, frustrated with its treatment at the hands of Helms, cancelled the leases of the equipment driven by Packer and the drivers junior to Packer. Two weeks later, Helms Express laid off these drivers.

The Agency Agreement Cancellation and the Second Round of Lease Cancellations

Following the first round of lease cancellations on September 14, 1981, Emeryville anticipated a response from Helms Express with respect to the numerous problems in their relationship. To the contrary, no response was received. On September 24, 1981, Emeryville cancelled the agency agreement and all remaining equipment leases. Helms Express acknowledged the cancellations without protest and notified its drivers of their layoff.

Based upon the foregoing, the Board initially concluded that the agency agreement and the second round of equipment leases were lawfully cancelled by Emeryville as an independent business decision. The Board specifically found that Emeryville ceased doing business with Helms

because Helms "was paying no attention" to Emeryville's continuing complaints about their business relationship. The Board stated that the second round of cancellations was separate from the first round and would have occurred regardless of the Packer grievance. *See* p. 70a, *infra.*

In its Supplemental Decision and Order, however, the Board reversed its field and concluded that the second round of cancellations also violated Section 8(a)(3) and (1) of the Act. The Board found that the first round of cancellations "accelerated" the second, stating:

> While [Emeryville's] relationship with Helms had become frayed even before the Packer grievance, there is nothing to indicate that absent the discriminatory 14 September layoffs, [Emeryville] would not have continued the balance of the Helms leases to term. In these circumstances, we find the General Counsel has established that Emeryville terminated the balance of the truck leases with Helms on 30 September as a result of the unlawful 14 September layoffs. Such conduct, which caused the layoff of 30 additional drivers, must be found to violate Section 8(a)(3) and (1) of the Act, unless it can be shown that an independent intervening event caused the second round of cancellations.

See p. 79a-80a, *infra.*

In reaching its decision, the Board further stated:

> [W]e do not disturb the judge's finding, which we previously adopted, that the record fails to show any specific discriminatory motivation for the second round of cancellations. No such evidence is necessary where it has been established, as in this case, that an action adversely affecting employees' terms and conditions of employment came about as a result of unlawful acts,

rather than as a result of completely independent lawful events.

See. p. 82a, *infra.*

Yet the Board added:

In the compliance stage of this proceeding, [Emeryville] is free to introduce evidence establishing that factors other than the Packer grievance would have resulted in an earlier termination of some or all of the discriminatees and thereby mitigate its backpay liability.

See p. 83a, *infra.*

REASONS FOR GRANTING THE WRIT

I. The Joint Employer Issue

A. The Third Circuit's application of the joint employer concept to the agent of the admitted employer extends the definition of "employer" beyond the limits of the National Labor Relations Act and is inconsistent with decisions of this Court and other Courts of Appeals.

In *Boire v. Greyhound Corp.*, 376 U. S. 473 (1964), a general contractor, Greyhound, operated a number of bus terminals. Greyhound engaged a subcontractor, Floors, Inc., to provide cleaning services at the terminals. Although Floors, Inc. hired, paid, disciplined, transferred, promoted, and discharged the cleaning employees, Greyhound took part in setting up work schedules, determining staffing levels, and supervising day-to-day activities. A union filed a petition seeking to represent the cleaning employees at the terminals, alleging that Greyhound and Floors, Inc. were joint employers.

This Court framed the issue as follows:

> Whether Greyhound . . . possessed sufficient control over the work of the employees to qualify as a joint employer with Floors. . . .

376 U. S. at 481. The Court concluded that Greyhound's status as a joint employer was "essentially a factual issue." *Id.*

The rationale supporting the imposition of joint employer status on the general contractor under the facts of *Boire v. Greyhound* is sound. The general contractor possesses a clear choice. If the general contractor wishes, it may retain a true independent contractor and leave that independent contractor wholly to its own discretion with respect to the control and direction of its own employees. In that case, the general contractor insulates itself from whatever liability may arise from the unfair labor practices committed by the subcontractor.

If, conversely, the general contractor elects to participate in the control and direction of the subcontractor's employees, the general contractor cannot later disclaim responsibility for unfair labor practices committed against those employees. Having opted to become a "partner" in the direction and control of a group of employees, the general contractor becomes liable for any unfair labor practices committed by the "partnership." A contrary result would permit the general contractor to place itself in the best of all worlds—possessed of the authority to control and direct employees but insulated from liability for its actions by the presence of a nominally "independent" subcontractor.

The joint employer analysis, however, becomes fundamentally flawed when transplanted from the factual setting

of *Boire v. Greyhound* to the reversed factual setting of this case. Here, Helms Express, the principal, is analogous to the general contractor and Emeryville, the agent, is analogous to the subcontractor. The principal/general contractor in this case accepted and performed, rather than sought to avoid, the obligations of the employer. Helms Express was the signatory to the NMFA and determined the labor relations policies applicable to its own employees. Pursuant to the agency agreement, Emeryville was compelled to observe the policies dictated by Helms Express. The minimal discretion exercised by Emeryville fell far short of that exercised in many cases where the Board and the courts have declined to find joint employer status. *Laerco Transportation and Warehouse,* 269 N.L.R.B. 324 (1984); *Teamsters and Auto Truck Drivers,* 253 N.L.R.B. 632 (1980); *United States Steel Corp.,* 270 N.L.R.B. 1318 (1984).

An examination of the decisions of the Courts of Appeals reveals that the joint employer analysis simply has no place in factual contexts analagous to this case. In *Kaylor v. Crown Zellerbach, Inc.,* 643 F.2d 1362 (9th Cir. 1981), a warehouse operator leased trucks with drivers from a trucking company. The warehouse operator possessed "*full control* over the dispatch, routing, and use of its trucks and the hours of service of the drivers". 643 F.2d at 1365 (emphasis added). The trucking company, however, employed the drivers pursuant to a collective bargaining agreement and remained solely responsible for wages and benefits. *Id.*

The Ninth Circuit flatly rejected the contention that the warehouse operator was a joint employer of the drivers. The court stated:

> The business relationship of [the warehouse operator] and [the trucking company] were close and interconnected. But appellants produced no evidence of joint ownership or control of the two companies. Although [the warehouse operator] necessarily directed the drivers to some extent, the trucking company was in control of their wages, benefits, and working conditions. On this record, no issue is raised that [the warehouse company] and [the trucking company] were joint employers of the drivers.

643 F.2d at 1368.

Similarly, in *Ace Doran Hauling & Rigging Co. v. N.L.R.B.*, 462 F.2d 190 (6th Cir. 1972), the Sixth Circuit held that drivers of equipment leased by the owner to a terminal operator were employed solely by the owner-lessor, who hired, fired, and compensated the drivers. As the court stated, "[a]ny other result would greatly expand the meaning of the term 'employee' under the Act, an expansion which Congress explicitly inhibited in [the 1947 Taft-Hartley amendments]". 462 F.2d at 194.

Further, the Third Circuit failed to recognize the significant practical difficulties its decision creates for the steel hauling sector of the trucking industry or any other industry where principal-agent relationships are common. Common carriers such as Helms Express are ill-equipped to manage their own terminal operations without the assistance of agents such as Emeryville. The effect of the Third Circuit's decision will be to deter potential agents from accepting such assignments rather than expose themselves to joint employer liability for the actions of the principal.

In lieu of the Third's Circuit's misplaced reliance on joint employer principles, a proper analysis of this case begins with the language of Section 2(2) of the Act, which

provides that "(t)he term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . . " 29 U.S.C. § 152(2). In interpreting Section 2(2), the Board has long held that an employer is liable for the acts of an individual agent acting under the employer's apparent authority, even if such acts are contrary to the employer's instructions. The individual agent in such cases is, in effect, the employer for purposes of fixing liability. *Alladin Indus.*, 147 N.L.R.B. 1391 (1964).

In *N.L.R.B. v. Schroeder*, 726 F.2d 967 (3d Cir. 1984), the Third Circuit addressed the importance of the agency concept to the statutory scheme enacted by Congress. As the court noted, the plain language of the statute renders "employer" status critical to the determination of Section 8(a) violations. The court found this proposition especially compelling where, as in the instant case, the contractual employer is a party to a collective bargaining agreement, stating:

> In general the party with whom the employee has reached a labor agreement, be it an individual or a corporation, does not (or cannot) speak individually. Instead, it speaks through specific persons. The NLRA recognizes this obvious fact by defining an "employer" in Section 2(2) as including agents, direct and indirect, of the employer.

726 F.2d at 970.

Relevant Board decisions demonstrate that, in situations analogous to the instant case, it is the principal alone and *not* the agent that is the statutory "employer." In the early case of *Howell and Van Schaak & Co.*, 95 N.L.R.B. 1028 (1951), owners of various commercial buildings entered into agency contracts with real estate management companies. The agency contracts, which were terminable

at will, provided that the management companies would receive a percentage of gross rent collected in compensation for the services provided. Although actual hiring and firing of the employees was handled by the management companies, veto power over those decisions was retained by the building owners. The Board found:

> It is clear that such authority as [the management companies] have over the employees involved herein stems solely from the respective contracts of agency which may be terminated at will. In view of the fact that the essential right of control over matters fundamental to the employment relationship is retained by the building owners and is exercised by [the management companies] only at the will of such owners, we find that . . . the building owners are the Employers.

95 N.L.R.B. at 1029. *See also Huntington Hospital, Inc.*, 229 N.L.R.B. 253 (1977).

In examining the facts of this case, it is plain that the acts of Emeryville which the Board found to be indicative of joint employer status are nothing more than the manifestation of Emeryville's role as Helms Express' agent. In fact, the agents in *Howell* and *Huntington Hospital* exercised far greater authority than Emeryville was found to have exercised in this case. Pursuant to the Helms Express-Emeryville agency agreement, Emeryville dispatched Helms Express' employees as required by the NMFA, to which only Helms Express was a party; advanced expense money; administered sick day and vacation funds and made payments from the funds in accordance with Helms Express' obligations under the NMFA; and, received employment applications and hired drivers subject to

Helms Express' approval. In the performance of these obligations, Emeryville operated under policies established by Helms Express.

Most significantly, the record is devoid of any evidence that Emeryville's performance of its agency obligations did not inure to the exclusive benefit of Helms Express. Each and every one of Emeryville's duties might have been as easily performed by individual supervisors, managers, or other agents employed by Helms Express. The fact that Helms Express elected to operate its business and discharge its responsibilities under its collective bargaining agreement with the union through the employment of a corporate agent cannot alter the fact that Helms Express at all times remained the sole employer of its employees under Section 2(2) of the Act.

B. The decision below that the Board's General Counsel may execute a settlement agreement with one joint employer and impose total primary liability upon the second joint employer raises important and unresolved problems.

On December 3, 1984, after commencement of the hearing on this complaint, the Administrative Law Judge ("ALJ") approved a settlement agreement between counsel for the Board's General Counsel and Helms Express. The settlement agreement provided that Helms Express would be secondarily liable for damages resulting from the first round of lease cancellations on September 17, 1981, but that Helms Express' liability would not extend beyond the cancellation of the Emeryville-Helms Express Agency agreement on September 30, 1981.

Emeryville strenuously objected to the General Counsel-Helms Express settlement agreement at the hearing

before the ALJ and at all relevant stages of the proceeding thereafter. Nevertheless, neither the Board nor the Third Circuit addressed these objections.

This Court recently reiterated that, once the hearing on the complaint begins, a nonconsenting party may challenge the settlement before the ALJ, and an appeal of the ALJ's determination is available before the Board. Judicial review of the Board's decision is authorized by Section 10(f) of the Act. *N.L.R.B. v. United Food and Commercial Workers Union, Local 23*, 484 U.S. ___, 98 L.Ed. 2d 429 (1987).

Pursuant to Section 10(f), a reviewing court must set aside a Board decision "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). Review of the Board's application of legal precepts to the facts is plenary. *N.L.R.B. v. Babcock & Wilcox*, 351 U.S. 105 (1956).

With respect to the facts of this case, the overwhelming evidence shows that the purpose of Helms Express' outrageous conduct was to eliminate Emeryville as the agent of Helms Express. In so doing, Helms Express ridded itself of its obligations under the National Master Freight Agreement, a collective bargaining agreement which Helms Express negotiated and signed and by which it was bound. By approving the settlement agreement between Helms Express and the General Counsel, the Board and the Third Circuit foreclosed imposition of liability upon the true wrongdoers.

Overwhelming and unrebutted evidence of Helms Express' union animus was never discussed by the Board or the Third Circuit. This evidence included the following:

- When Packer first applied for a position with Helms Express, he was fired by Helms Express before his thirty-day probationary period expired. A Helms Express manager stated that this was due to Packer's union activities. It was only after Packer's successful prosecution of a grievance, with Emeryville's support, that Packer became a permanent Helms Express driver.

- When another prospective employee applied for a position with Helms Express, he too was fired before his thirty-day probationary period expired. A Helms Express manager stated that, like Packer, this person was fired because of his union activities.

- After Roy Haggard took over the operation of the Astro Division, he stated that drivers who were members of Local 800 would no longer be hired to drive trucks leased to Helms Express and idle trucks would only be operated under non-union contracts.

- In late 1980, after Emeryville had ordered twenty-five new trucks, Helms Express refused to permit Emeryville to lease them to Helms Express because union drivers would have to be hired to drive them. Emeryville subsequently leased the trucks to another Warrendale-based carrier, which found enough business to keep the trucks running.

- In violation of the National Master Freight Agreement, Helms Express opened a non-union terminal in Beaver Falls, Pennsylvania.

- Haggard's predecessor as head of the Astro Division was reassigned to run Gemini, a non-union contract carrier that Helms Express established secretly.

- Helms Express' parent, Ryder Truck Lines, acquired a non-union company which directly competed with the Astro Division. In 1982, after the closure of the Astro Division was complete, the Helms-Astro agents were retained by the I.U.-Ryder non-union operations.

- After the Astro Division shutdown, an officer of Helms Express stated that Haggard had been brought in for the sole purpose of closing the Astro Division.

- On September 14, 1981, there were idle trucks leased to Helms Express by a fleet owner whose trucks were domiciled at the Warrendale terminal. These trucks were idle because of Haggard's orders that no more union drivers from Local 800 be hired. Helms Express knew these trucks were available and that Packer and four others were laid off.

As the undisputed facts show, Helms Express almost certainly committed its own primary, independent violations of the Act by not transferring laid off drivers to other trucks and by refusing to pay the Packer grievance. By approving the settlement agreement, the Board deprived Emeryville of the opportunity to prove that another party was primarily liable for any harm suffered by the affected drivers.

Further, as the record makes clear, Helms Express as principal actually *condoned* its agent Emeryville's conduct. In the face of the cancellation of two rounds of equipment leases and the agency agreement, Helms Express offered no reaction but to accept Emeryville's actions. Had Helms Express wished, it could have forbidden Emeryville from taking actions which supposedly forced Helms Express to

lay off its drivers. For it was Helms Express, not Emeryville, which had the right to fire the drivers in question, a right contained in its labor agreement. Helms Express' total passivity was merely a convenient way to end the Emeryville relationship, an outcome Helms Express had instigated for approximately nine months.

With respect to the law, neither the Board nor the Third Circuit cites a single case for the startling proposition that the General Counsel may settle with one joint employer and impose total primary liability for unfair labor practices on another. Counsel for the petitioner is aware of no such authority. This void indicates how radically the present case departs from the Board's traditional practice and procedure and from basic standards of fairness.

The law which does exist in this area supports the conclusion opposite that reached, without discussion, by the Third Circuit and the Board. In *Ref-Chem Co.*, 169 N.L.R.B. 376 (1968), *enf't. denied on other grounds*, 418 F.2d 127 (5th Cir. 1969), the Board found a manufacturer to be a joint employer with a contractor hired to do work on the manufacturer's premises. The union representing the contractor's employees filed a timely charge against the contractor alleging a violation of Section 8(a)(5) and (1) of the Act. Subsequently, and more than six months after the alleged unlawful act, the charge was amended to include the manufacturer as a respondent. The manufacturer urged the Board that Section 10(b) of the Act mandated dismissal of the charge against it. The Board disagreed, holding:

> [The manufacturer's] liability under the Act cannot be considered separate and apart from that of [the contractor]. As joint employer, each is responsible for the conduct of the other and whatever unlawful practices

> are engaged in by the one must be deemed to have been committed by both .... [T]he nature of the joint employer relationship is such that the charge against [contractor] also constituted a charge against [manufacturer] for any unfair labor practices found against its co-employer.

169 N.L.R.B. at 380.

In an analogous case involving "single employer" concepts, the Board reversed the decision of an Administrative Law Judge imposing unfair labor practice liability on only one of the employers jointly and severally liable. In *Drapery Mfg. Co.*, 166 N.L.R.B. 805 (1967), two companies were found to have violated Section 8(a)(1), (3), and (5) of the Act. The Board held:

> In our opinion this limitation of affirmative responsibility to only one of the Respondents results in an order entirely inadequate to remedy the joint unfair labor practices which have been committed. Accordingly we shall amend the order so that it will be applicable to [both companies].

166 N.L.R.B. at 805.

Thus, *Ref-Chem* and *Drapery Mfg.* suggest that settlement with one joint employer is tantamount to settlement with all. Because the complaint against Helms Express was dismissed, the complaint against Emeryville must likewise be dismissed.

Alternatively, if the complaint against Emeryville is not to be dismissed, a new hearing must be granted with Helms Express as co-respondent. The inequity of proceeding against one joint employer while not proceeding against the other is even more obvious in this case than in *Ref-Chem*. Unlike *Ref-Chem*—where, at least, the

employer which was party to the labor agreement was initially charged—the admitted employer and party to the labor agreement here is released. The unfairness to Emeryville is manifest. As a result of the settlement and the Board's Order, Emeryville was primarily liable to all of the Helms Express employees for *15 months.* Emeryville's co-employer, Helms Express, was secondarily liable to a fraction of the Helms Express employees for *2 weeks.* Emeryville's basic rights to contribution and indemnity from its co-employer cannot be so easily defeated at the whim of the General Counsel.

Finally, the settlement approved by the Board and the Third Circuit in this case fails to satisfy even the Board's own procedural guidelines. It is plain that the Board's Casehandling Manual makes no provisions whatever for settlement with only one joint employer, although settlement procedures in a variety of other situations are set forth in great detail. This fact further illustrates the unprecedented and unauthorized nature of the General Counsel's actions in this case.

The Casehandling Manual does provide procedures for settlement of parallel violations of Section 8(a)(3) (by an employer) and Section 8(b)(2) (by a union). While the company and the union are not "joint" parties in the sense of the joint employer situation, the Board's 8(a)(3)—8(b)(2) procedures do provide guidance concerning the requisites of a fair settlement. The Casehandling Manual provides:

> *Joint and Several Liability:* In companion 8(a)(3) and 8(b)(2) cases growing out of the same acts of discrimination, the stipulated order may require the employer

> respondent and the union respondent jointly and severally to make whole the discriminatees. *The stipulations should generally not attempt to apportion the liability between the employer and the union....*
>
> Where one party is willing to settle, but the other respondent insists upon trial of the case, a settlement agreement may be taken from the party who is willing to settle. Appropriate provisions should be inserted in the agreement, however, to assure that the respondent or respondents signing the stipulation will bear only its or their proportionate share of the backpay liability unless efforts to obtain payment of the remaining portion of the backpay from the other respondent or respondents should fail.

N.L.R.B. Casehandling Manual § 10130.4 (emphasis supplied).

With respect to compliance with such settlements, the Casehandling Manual further provides:

> *Joint and Several Liability:* Where the backpay liability of a respondent employer and a respondent union in a companion CA-CB case is joint and several, *all reasonable measures should be taken by the compliance officer to assure that the liability is in fact borne equally* by the employer and the union.
>
> * * *
>
> In cases where all respondents indicate a desire to settle (the word "settle" is used herein to cover compliance as well), *each should pay its equal share.*

N.L.R.B. Casehandling Manual § 10636 (emphasis supplied).

Thus, even assuming that settlement with one joint employer was proper, the terms of the General Counsel-

Helms Express settlement simply cannot satisfy even the Board's own guidelines. Rather than the fifty-fifty split contemplated by Section 10130.4, the General Counsel elected to apportion *100%* of liability to Emeryville, with Helms' Express only secondarily liable for a tiny fraction of the total amount. Absolutely no attempt was made by the Board to see that Helms Express paid its "proportionate share" or "equal share."

Nor was this a case where Emeryville "insisted upon trial of the case." Emeryville was never given an opportunity to settle, at least not on the terms presented to Helms Express.[2]

In sum, because the issues surrounding settlement with one joint employer and imposition of total primary liability upon the second joint employer raise important problems not addressed by this Court or the Courts of Appeals, petitioner respectfully suggests that certiorari should be granted.

II. The Burden of Proof Issue

A. The Third Circuit's decision concerning cancellation of the second round of leases and the agency agreement is inconsistent with Section 10(c) of the Act and conflicts with decisions of this Court and other Courts of Appeals.

The resolution of unfair labor practice charges arising under Section 8(a) (3) of the Act involving so-called "dual motive" discharge or discipline—that is, discharge or discipline in which the decision to discharge or discipline an employee may be motivated by opposition to protected

[2]Of course, the General Counsel could not offer precisely the same deal to Emeryville as it did to Helms Express lest both alleged joint wrongdoers be secondarily liable.

activity or by legitimate business reasons, or both—is governed by the legal standard set forth in *Wright Line, a Division of Wright Line,* 251 N.L.R.B. 1083 (1980), *enf'd on other grounds,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982). The Board's *Wright Line* analysis was approved by this Court in *N.L.R.B. v. Transportation Management Corp.,* 462 U.S. 393 (1983).

Under the *Wright Line* test, the General Counsel must initially make out a *prima facie* showing of discriminatory discharge by supporting the inference that protected conduct was "a motivating factor" in the employee's decision. Only if the General Counsel establishes a *prima facie* case, the burden shifts to the employer to show that the discharge or discipline would have occurred even in the absence of the protected activity. *Wright Line, supra* at 1089.

The ALJ expressly analyzed whether activity protected by the Act motivated Emeryville to cancel the second round of truck leases and the agency agreement. As a result of that analysis, the ALJ found no violation of Section 8(a)(3) and (1) of the Act:

> [O]nce Emeryville discriminatorily cancelled the first round of leases, the second round of leases and the agency agreement were cancelled as an independent business decision . . . [O]n the second round of lease cancellations, Emeryville threw in the towel on Helms because Helms was paying no attention. I see it as a business decision that is separate from the first round of cancellations and that "would have taken place even in the absence of the protected conduct". *Wright Line,* supra, 251 NLRB at 1089. Other than surmise that the timing of the second round of the cancellations ten days later was to thwart a Packer grievance

> or had other anti-union animus, there is *no record support* for finding that the second round was not done out of frustration with Helms, which had made no effort to reconcile the differences on which Emeryville had been seeking redress since July. Once the Packer grievance triggered the first round of cancellations, there is *no knowing* when the second round would have come, if at all.

See p. 70a, *infra* (emphasis added).

However, the Board's supplemental decision, enforced by the Third Circuit, held that the second round of cancellations was "accelerated" by the first:

> While [Emeryville's] relationship with Helms had become frayed even before the Packer grievance, there is nothing to indicate that absent the discriminatory 14 September layoffs, [Emeryville] would *not* have continued the balance of the Helms leases to term. In these circumstances, we find the General Counsel has established that [Emeryville] terminated the balance of the truck leases with Helms on 30 September as a result of the unlawful 14 September layoffs. Such conduct . . . must be found to violate Section 8(a)(3) and (1) of the Act, unless it can be shown that an independent intervening event caused the second round of cancellations.

See p. 79a-80a, *infra* (emphasis added).

This analysis is directly contrary to the mandate of Section 10(c) of the Act, which requires that *each* independent unfair labor practice be proven by "a preponderance of the testimony taken by the Board." 29 U.S.C. § 160. The decisions of the Third Circuit and the Board literally obliterate the *Wright Line-Transportation Management*

requirement of the *prima facie* case of unlawful discrimination. Based upon a finding of one unfair labor practice—the first round of cancellations—the Third Circuit and the Board inferred a *prima facie* case in a second independent complaint. Under the Third Circuit's reasoning, prior violations by an employer relieve the General Counsel of the burden of establishing a *prima facie* case for future violations, imposing upon the employer the burden of *disproving* the charges.

To the contrary, the *prima facie* case requirement is neither relaxed nor excused by the fact that the timing of the employer's decision, and not the decision itself, is alleged to be unlawful. The burden is on the General Counsel in this case to prove that the second round of cancellations was accelerated. It is *not* Emeryville's burden to show that, but for an earlier unfair labor practice found by the Board, the cancellations would not have occurred later.

In the absence of clear evidence of anti-union animus, the Courts of Appeals simply refuse to find that a lawful business decision was accelerated. In fact, even if such evidence is present, some Courts of Appeals have declined to adopt the theory that a lawful decision, even if accelerated, constitutes an independent unfair labor practice. An examination of these cases is instructive in the instant matter.

In *N.L.R.B. v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), the employer demonstrated lawful reasons, including inadequate facilities, high costs, and frequent employee turnover, necessitating the closure of its existing plant and relocation to new quarters. Prior to a final decision to relocate, however, an election was conducted and a union was certified as collective bargaining representative

at the existing plant. Approximately one month later, the employer completed the move. The Board found that the employer's decision violated Section 8(a)(3) and (1) because it was accelerated by the union activity. 293 F.2d 173-74.

The Second Circuit denied enforcement. It held:

> In those situations where a change or discontinuance of business operations is dictated by sound financial or economic reasons the courts have refused to find that § 8(a)(3) has been violated even though the employer action may have been accelerated by the union activity . . . It is our view that the record before us does not support the inference drawn from it by the Board that Rapid's move was motivated by the desire to avoid its obligations to Union. All of the evidence points to motivation for sound business reasons. Though there may have been animosity between Union and Rapid, animosity furnishes no basis for the inference that this was the preponderant motive for the move when convincing evidence was received demonstrating business necessity. The decided cases do not condemn an employer who considers his relationship with his plant's union as only one part of the broad economic picture he must survey when he is faced with determining the desirability of making changes in his operations.

293 F.2d at 174-75.

In *N.L.R.B. v. Lassing,* 284 F.2d 781 (6th Cir. 1960), *cert. denied,* 366 U.S. 909 (1961), the employer studied its method of delivering gas with its own employees. The employer determined that such delivery should be performed by common carrier in the event that *any* excess costs were incurred. At that time the employer knew that

its truck licenses expired on a certain date and that delivery services would not be continued beyond that date. Prior to the final decision, a union requested recognition and a meeting for purposes of collective bargaining. The day prior to the first scheduled meeting, the employer announced that delivery would thereafter be performed by common carrier, and the drivers were laid off. The Board found that the employer violated Section 8(a)(3) and (1) by accelerating the proposed change in operations on account of union activity. 284 F.2d 782-83.

The Sixth circuit denied enforcement. After reiterating that a change in operations motivated by financial or economic reasons is not an unfair labor practice, the court concluded:

> Fundamentally, the change was made because of reasonably anticipated increased costs, regardless of whether this increased cost was caused by the advent of the Union or by some other factor entering into the picture. This did not constitute discrimination against the three employees with respect to their tenure of employment because of membership in the Union, within the provisions of Section 8(a)(1) and (3) of the Act.

284 F.2d at 783.

Significantly, the burden in *Lassing* remained with the General Counsel to prove that the layoff was, in fact, accelerated; the court refused to require the employer, as the Board did in the instant case, to prove that the layoff would *not* have occurred later (for example, on the date of the license expiration) absent any union activity. The *Lassing* result is sound for two reasons. First, it comports with Section 10(c) of the Act, 29 U.S.C. § 160(c), which requires that each unfair labor practice be proven by a

preponderance of the evidence. Second, it comports with the fundamental premise that it is virtually impossible to prove a negative proposition; by requiring an employer to conclusively show that, for whatever reason, something would *not* have happened, the Board requires proof no employer can ever provide.

Finally, in *N.L.R.B. v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954), the employer terminated its newspaper delivery employees and established a network of independent contractors to deliver newspapers. The Board found that, although economically motivated, the conversion was accelerated on account of the employees' concerted activity. 211 F.2d 851.

The Fifth Circuit denied enforcement, holding:

> We do not think that, because the respondent accelerated the change-over in order to avoid anticipated union interference, it necessarily follows that the original decision to change was to defeat union organizational efforts. It is the motive for the decision to change-over that is material to this controversy rather than the motive for accelerating the change-over.

211 F.2d 854.

Further the court addressed the particular sensitivity of reconciling lawful, economically-motivated business changes with the mandates of the Act. In a passage equally pertinent to the instant case, the court stated:

> When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can

> be set aside by the board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance. In our opinion, this is not such a case.

211 F.2d 854-55 (footnote omitted).

As all of the preceding cases make clear, this case requires an independent showing, based upon a preponderance of the evidence, that the cancellations of the second round of leases and the agency agreement were unlawfully accelerated. Because the General Counsel failed to produce, and the Administrative Law Judge, the Board, and the Third Circuit failed to find, such evidence, Emeryville's actions were lawful.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

. . . . . .

STUART A. WILLIAMS

ECKERT SEAMANS CHERIN & MELLOTT
600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000
Counsel of Record

September 7, 1988

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

EMERYVILLE TRUCKING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIFICATE OF SERVICE

I, Stuart A. Williams, a member of the Bar of this Court, hereby certify that on the 7th day of September, 1988, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Aileen A. Armstrong, Deputy Associate General Counsel, National Labor Relations Board, office of the General Counsel, Washington, D.C. 20570. I further certify that all parties required to be served have been served.

.....

STUART A. WILLIAMS

ECKERT SEAMANS CHERIN & MELLOTT
600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000
Counsel of Record

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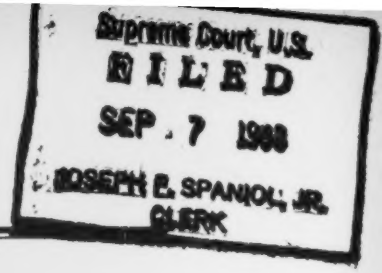

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Petitioner,

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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STUART A. WILLIAMS
ECKERT SEAMANS CHERIN & MELLOTT
600 Grant Street, 42nd Floor
Pittsburgh, Pennsylvania 15219
(412) 566-6000
Counsel of Record

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TEXT OF NATIONAL LABOR RELATIONS ACT, AS AMENDED 29 U.S.C. § 151-69

FINDINGS AND POLICIES

Section 151. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not posses full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing

certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

Sec. 152. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees in cases under Title II of the United States Code or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the

foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care

facility, or other institution devoted to the care of sick, infirm, or aged person.

NATIONAL LABOR RELATIONS BOARD

Sec. 153. (a) The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member who shall serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) The Board is authorized to delegate to any group of three or more members any or all the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof,

except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noted.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, and an account of all moneys it has disbursed.

(d) There shall be a General Counsel of the Board who shall be apppointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so

designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment *sine die* of the session of the Senate in which such nomination was submitted.

Sec. 154. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

Sec. 155. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Sec. 156. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

RIGHTS OF EMPLOYEES

Sec. 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 158. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to recind the authority of such labor organization to make such an agreeement: *Provided further,*

That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and

the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where

not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer

with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction for services which are not performed or not be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is

currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

> (1) serves a written notice upon the party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike with the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for

such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certificaiton or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing

such agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or in industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires a condition of employment,

membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice, once given, may be extended by the written agreement of both parties.

REPRESENTATIVES AND ELECTIONS

Sec. 159. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in each unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or; (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership,

or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a): the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists,

it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought and in no case shall the Board deny a labor organiztion a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organiztion and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 160. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over

any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other

person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon

the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall require the reinstatement or any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in the case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code.

Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the court shall be subject to review by the appropriate United States court of appeals if application was made to the district court as

hereinabove provided, and by the Supreme Court of the United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, an in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory

evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, not withstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order

under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or(b)(2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1).

INVESTIGATORY POWERS

Sec. 161. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board of such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or with the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides

or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) [Repealed].

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or be registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered or certified and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judical district where the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the

Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board

Sec. 162. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than year, or both.

LIMITATIONS

Sec. 163. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on the right.

Sec. 164. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute on commerce is not sufficiently

substantial to warrant the exercise of its jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

Sec. 165. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U.S.C., title 11, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

Sec. 166. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 167. This Act may be cited as the "National Labor Relations Act."

Sec. 168. No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as

amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have compiled with the requirements of section 9(f), (g), or (h) of the aforesaid Act prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have compiled with the provisions of section 9(f), (g) or (h) of the aforesaid Act prior to November 7, 1947: *Provided*, That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment: *Provided, however*, That this prov iso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10(e) or (f) and which have become final.

INDIVIDUALS WITH RELIGIOUS CONVICTIONS

Sec. 169. Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious nonlabor organization charitable fund exempt from taxation under section 501 (c)(3) of title 26 of the Internal Revenue Code, chosen by such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD

EMERYVILLE TRUCKING, INC.	
and	**Case 6—CA—14900**
MELVIN PACKER, an Individual	

DECISION AND ORDER

On 24 June 1985 Administrative Law Judge Burton S. Kolko issued the attached decision. The Respondent filed exceptions, a supporting brief, and a request for oral argument. The General Counsel filed an answering brief, and also filed limited cross-exceptions and a supporting brief. The Respondent thereafter filed an opposition brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to

affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified. [2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Emeryville Trucking, Inc., Warrendale, Pennsylvania, its officers,

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[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondent also contends, inter alia, that the judge predetermined the case adverse to the Respondent before all the evidence was taken and should have disqualified himself pursuant to its posthearing motion for disqualification. Careful review of the record shows no statements or other evidence indicating bias or prejudice against the Respondent by the judge. We therefore find no merit in the Respondent's contention that the judge erred in denying its posthearing motion for disqualification of the judge. The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2]We shall modify the judge's recommended Order to set forth the names of the 31 drivers discriminatorily laid off on 14 September 1981, and to include therein, pursuant to *Sterling Sugars*, 261 NLRB 472 (1982), the affirmative requirement that the Respondent remove from its records any reference to those layoffs. The Respondent shall also be required to provide written notice of expunction to each of the discriminatorily laid-off drivers and to inform them that the Respondent's conduct will not be used as a basis for future personnel action against them.

The judge's recommended Order is also modified to include a provision directing the Respondent to preserve and make available to the Board copies of pertinent records and documents necessary to compute the amount of backpay due those discriminatorily laid off.

Member Johansen would terminate backpay 30 September 1981, the date the Respondent terminated its relationship with Helms for lawful, independent business reasons.

agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(b).

"(b) Make whole the following drivers for any loss of pay and benefits that they suffered by reason of Emeryville's having caused their layoff:

Dennis Baker	Floyd Baldwin
Lonnie Bemis	Terry Begley
Charles Bronson	David Brown
Steve Caltagirone	Tom Chapot
Donald Disko	Anthony Elkins
Charles Gerson	Gary Hussey
Tom Joyce	Lewis Linhart
Guy McCool	Donald Miller
David Miller	Harry Mulder
William Oliver	John O'Sche
Melvin Packer	Harold Parks
Wallie Rohrer	Mark Ross
David Schirm	Shane Schandeimeier
Robert Stahura	John Stromberg
James Tomcho	Gary Vuchinich"
Tom Writt	

2. Insert the following paragraphs as 2(c) and (d) and reletter subsequent paragraphs.

"(c) Remove from its files any reference to the 14 September 1981 layoff of the above-listed drivers and notify each of them in writing that this has been done and that evidence of these layoffs will not be used against them in any way.

"(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 24 March 1986

.....
Donald L. Dotson, Chairman

.....
Wilford W. Johansen, Member

.....
Marshall B. Babson, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off or cause the layoff of employees who file grievances or who help other employees file grievances, or who engage in union activities.

WE WILL NOT refuse to employ or refuse to transfer employees who engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer employment to driver Melvin Packer.

WE WILL pay backpay with interest to the following drivers whose layoffs we caused by cancelling truck leases with Helms Express:

Dennis Baker Floyd Baldwin

Lonnie Bemis	Terry Begley
Charles Bronson	David Brown
Steve Caltagirone	Tom Chapot
Donald Disko	Anthony Elkins
Charles Gerson	Gary Hussey
Tom Joyce	Lewis Linhart
Guy McCool	Donald Miller
David Miller	Harry Mulder
William Oliver	John O'Sche
Melvin Packer	Harold Parks
Wallie Rohrer	Mark Ross
David Schirm	Shane Schandeimeier
Robert Stahura	John Stromberg
James Tomcho	Gary Vuchinich
Tom Writt	

WE WILL remove from our files any reference to the discriminatory layoff of the above-listed drivers, and WE WILL notify each of them that this has been done and that evidence of these unlawful layoffs will not be used as a basis for future personnel action against them.

EMERYVILLE TRUCKING, INC.

.....
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered,

defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1501 William S. Moorhead Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2969.

United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

EMERYVILLE TRUCKING, INC.		
and	}	**Case 6—CA—14900**
MELVIN PACKER, An Individual		

Charles H. Saul, Esq.,
of Pittsburgh, PA, for
the General Counsel.
Anthony P. Picadio, Esq.,
Pittsburgh, PA, for Respondent
Emeryville Trucking.

DECISION

BURTON S. KOLKO, Administrative Law Judge: Melvin Packer drove an over-the-road tractor trailer that was leased by Emeryville Trucking to Helms Express. Helms was an ICC licensed common carrier, and the loads that Packer carried often were loads that Helms was delivering under its ICC authority. Emeryville was Helms' agent in Warrendale, Pennsylvania, for soliciting customers and for hiring, dispatching, and controlling the drivers who drove out of the Warrendale terminal. Packer was one such driver.

Packer had succeeded in pursuing a grievance for being forced by Emeryville to decline Helms' loads and to return to Emeryville's terminal empty from Detroit. Packer filed the grievance under the terms of the collective

bargaining agreement to which Helms was a party. Helms would not pay the grievance award, and referred it to Emeryville. Emeryville's president, Phillip Rezzetano told Packer that if Emeryville had to pay Packer what he had been awarded by the grievance panel, Packer would be through driving for Emeryville. When Packer insisted on picking up his check, Rezzetano cancelled the leases to Helms of the 30 trucks whose drivers were junior to Packer, and then cancelled the lease on the truck that Packer was driving.

The General Counsel alleges that Emeryville violated Sections 8(a)(3) and 8(a)(1) of the Act by these and succeeding actions. Emeryville denies that it did so, its denial based both on its interpretation of the facts and on its defense that it was not Packer's employer, but was merely Helms' agent in hiring him. I find that Emeryville did cause the layoff of Packer and 30 others, that it was Packer's employer jointly with Helms, and that it has violated the Act.[1] Regarding a second round of lease cancellations that occurred ten days after the Packer incident, I dismiss the complaint.

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[1]29 U.S.C. ss 158(a)(3) and 158 (a)(1).

The complaint issued on 17 December 1981. While it names both Emeryville Trucking and Helms Express as respondents, Helms Express and the General Counsel reached a settlement that was approved by the Administrative Law Judge over the objection of Emeryville. After the hearing, which concluded on 7 December 1984, Emeryville filed a Motion for Disqualification of the Administrative Law Judge. The motion is without merit, and is denied. The General Counsel's Motion to Correct the Transcript is granted.

The record contains two transcript volumes that begin with page 1. The first of such volumes is dated 22 November 1983, the day when the record was opened and some procedural matters were discussed, and it contains pages 1-8. The second such volume is dated 3 December 1984,

(Continued on next page)

I. The Joint Employer Issue

The threshold issue is the relationship between Helms and Emeryville, since the General Counsel is proceeding on the theory that they were joint employers of Packer and the other drivers whose truck leases with Helms were terminated by Emeryville. For its part, Emeryville denies that it was an employer rather than being merely the agent for Helms.

The joint employer concept deals with "independent legal entities that have merely 'historically chosen to handle jointly . . . important aspects of their employer-employee relationship.' " *N.L.R.B. v. Browning-Ferris Industries,* 691 F.2d 1117, 1122 (3rd. Cir. 1982), quoting from *N.L.R.B. v. Checker Cab Co.,* 367 F.2d 692, 698 (6th Cir. 1966).

> Under this standard, the question of 'joint employer' status is a factual one and requires an examination into whether an employer who is claimed to be a 'joint employer' 'possessed sufficient control over the work of the employees to qualify as a joint employer with [the actual employer].

Browning-Ferris, supra, at 691 F.2d 1121, quoting from *Boire v. Greyhound Corp.,* 376 U. S. 473, 481 (1964). Because the court's decision in *Browning-Ferris* states the law so well, and because it is in the 3rd Circuit that this case arises, further quotation from that decision is in order.

(Continued)

contains pp. 1-53, and is the first of four volumes that contain testimony. The final volume of transcript is dated 7 December 1984, contains pp. 615-625, and contains no testimony.

> In 'joint employer' situations no finding of a lack of arm's length transaction or unity of control or ownership is required, as in 'single employer' cases. As this Circuit has maintained since 1942, '*it* is rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers.' *N.L.R.B. v. Condenser Corp. of America,* supra, 128 F.2d at 72 (citations omitted). The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. *Walter B. Cooke,* 262 NLRB No. 74 (1982) (slip op. at 31). Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment. *C.R. Adams Trucking, Inc.,* 262 NLRB No. 67 (June 30, 1982) (slip op. at 5); *Ref-Chem Co., v. NLRB,* 418 F.2d 127, 129 (5th Cir. 1969); *N.L.R.B. v. Greyhound Corp.,* 368 F.2d 778, 780 (5th Cir. 1966).

The Board recently has expressed continued adherence to the *Browning-Ferris* principles, *Laerco Transportation,* 269 NLRB 324 (1984), see also *Clinton's Ditch Cooperative,* 274 NLRB No. 103 (1985). As stated by the Board, to resolve the instant issue we look to determine which "matters relating to the employment relationship such as hiring,

firing, discipline, supervision and direction" are "meaningfully affected" by Emeryville and by Helms. *Laerco Transportation,* supra, 269 NLRB at p. 325.[2]

A. Emeryville's Relationship with Helms and with the Drivers

Emeryville is the owner of a fleet of tractor trailer trucks that over the years it leased to various common carriers for use in the freight hauling business. Emeryville is owned by Phillip Rezzetano and his brother, John Rezzetano.

Emeryville leased its fleet of trucks to the Astro Division of Helms Express. Each tractor and trailer unit was covered by a separate written equipment lease under which Helms agreed to pay Emeryville 33 percent of freight revenues for rental of the tractor and 13 percent for rental of the trailer. Each lease stated:

> The Equipment which is the subject of the Lease shall be driven by an employee of the lessee at all times that it is in the service of the lessee.... The lessee expressly reserves the right to control the manner, means and details of, and by which the driver of such leased Equipment performs his services, as well as the ends to be accomplished.

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[2]It is not alleged that Helms and Emeryville constitute a "single employer," which if it were would require that we determine whether they have: (1) common ownership or financial control, (2) common management, (3) centralized control of labor relations, and (4) interrelated operations. See *Radio Union v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255 (1965), Therefore, I discount *United States Steel Corp.,* 270 NLRB No. 206 (1983), cited by Respondent, because it applies a "single employer" analysis to what is apparently a "joint employer" situation. See also *The John Breuner Company,* 248 NLRB 983 (1980).

In accordance with this provision, the equipment rented to Helms was driven by drivers who were hired by and employed by Helms.

In addition to the equipment leases, Emeryville was a party to an agency agreement with Helms under which Emeryville agreed to act as Helms' agent in the solicitation of freight business in an exclusive geographical territory that included parts of Pennsylvania, Ohio, and Indiana. Emeryville agreed:

> 7. To comply with all the rules, policies, and procedures from time-to-time established by the *carrier* including, but not limited to, the control of drivers' logs, the verification of hours of service, and inspection of vehicles.
>
> * * *
>
> 9. To advance to drivers not more than the percentage of revenue and/or other maximum amount as the *carrier* may from time-to-time prescribe.
>
> 10. To execute permanent leases only on lease forms supplied *carrier* and in the manner prescribed by the *carrier* and to make no commitment to any owner regarding the lease of equipment nor to any driver applicant regarding employment without the express prior approval of *carrier.*

The drivers who were hired by Helms to drive the trucks that were leased to Helms by Emeryville were members of Teamsters Local Union No. 800. Their terms and conditions of employment were established by the National Master Freight Agreement and Eastern Conference Area Iron and Steel Rider entered into on behalf of the drivers by the Teamsters National Freight Industry Negotiating Committee. Helms was a signatory to the National Master Freight Agreement, and Emeryville was

not. Emeryville did not participate in the negotiations that led to the Master Freight Agreement and the Iron and Steel Supplemental Agreement.

The method in which the drivers and trucks were dispatched was set forth in the National Master Freight Agreement. The drivers were paid by Helms by means of a Helms payroll check. The Helms payroll checks were mailed by Helms to Emeryville for distribution by Emeryville. Because Emeryville was required under its equipment leases with Helms to pay fuel and other maintenance expenses for the equipment, Emeryville would advance expense money to drivers. The drivers were obligated to return the unused portion of the advanced expense money to Emeryville. Emeryville was authorized by the drivers to cash the Helms payroll checks and to reimburse itself for any unsettled expenses from the proceeds of the payroll checks, remitting the balance to the drivers with an Emeryville check. However, in most cases the driver would settle his expense advance with Emeryville at the conclusion of a trip, and he would then receive the Helms payroll check for the applicable pay period.

A driver would receive money from Emeryville when he received payments for sick days or vacation. These payments were made from a fund administered by Emeryville for Helms. The fund was created by Helms by paying into it three percent of the gross freight revenues generated on trucks domiciled out of the Warrendale terminal. Although Emeryville administered the fund for Helms, a driver's eligibility for payments for the fund was determined by the National Master Freight Agreement, and Emeryville would make payments from this fund as directed by Helms.

With respect to hiring drivers, Emeryville had authority to receive a driver's application, after which a driver was placed on a thirty-day probationary status. Helms had the final decision to put the drivers on permanent status or to reject the application. Grievances were paid and processed by Helms, although sometimes the payment was made by Emeryville. The trucks leased to Helms carried Helms' markings.

B. Emeryville's Control of its Trucks

From the above recitation it appears that the normal indicia of the employer-employee relationship are met by Helms alone. But a closer look at Emeryville's role in the day-to-day operations shows that it in very substantial degree controlled how the drivers performed their jobs, to the point of laying them off or firing them if Emeryville's own standards were not met. This control over dispatch and discipline are sufficient to render Emeryville a joint employer with Helms.

The key to this finding is an understanding of Emeryville's control over its trucks, a control that extends beyond the passivity that Emeryville would have us believe inheres as a result of its being a lessor to Helms. For as important as the Helms agency and lease arrangements were to Emeryville, its "bogey" with the United States Steel Corporation loomed larger. That "bogey" with US Steel was a commitment by private agreement that Emeryville would move whatever loads that US Steel needed moved, and would do so on one-half day's notice. The Rezzetanos had worked hard for this business from US Steel, and not even their obligations to Helms stood in the way of their making Emeryville's trucks available to US Steel on an as-needed basis. This need to please US

Steel created some tension, which manifested itself often in terms of outbursts and threats of discharge to drivers who disrupted the pattern of having trucks that were leased to Helms nevertheless stay sufficiently close to Warrendale to be diverted to US Steel. Emeryville's drivers were obligated to call in to Emeryville before taking on each new load, and even if a Helms load was "on the board" the drivers were denied permission to take that load if by so doing they would be diminishing the Rezzetanos' ability to route that truck to the US Steel dock upon sudden notice. In fact, this case arises out of a circumstance where Helms' loads were denied to a driver by Emeryville.

Driver Melvin Packer had delivered a load in the Detroit, Michigan, area and was at a Detroit terminal of Helm's, where he was offered a load by the Helms agent that was destined for North Carolina. Packer told the agent he would take it, but called Emeryville to inform the Rezzetanos of the load and to receive permission for it. Packer was informed by Emeryville that he was not to take the Helms load to North Carolina. Packer then called to different terminals, and was able to get a load going to New York City. He then again called Emeryville to receive permission to take the load, but was told that he was not to haul that load either. Packer then told the Emeryville dispatcher, Robert Rezzetano, that it was obvious that he did not want Packer to haul a load. He asked, "why don't you bring me home instead of me hanging around?" Rezzetano laughed and instructed him to come back to Pittsburgh and to call the terminal later that day on his way back. Packer followed these instructions and came back empty to Warrendale. Packer then filed his grievance.

It seemed to Emeryville that the possible ramifications of this grievance were greater than the amount of money

due Packer if he were to win the grievance. Thus, as admitted by witness Bateman,[3] Phil and John Rezzetano told him "that they had a grievance with him that was important to their operation." The grievance had the possibility of establishing a precedent whereby in certain instances drivers could refuse to accept a trip lease ordered by Emeryville, could refuse orders to "dead-head" home, or could accept a Helms load regardless of the wishes of Emeryville.

So threatening to its US Steel business did this grievance appear to Emeryville that upon returning from the grievance hearing, Phil Rezzetano yelled at Packer "I have just come from that hearing and if I lose that grievance,

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[3]Bateman is president of Team Transport. Team Transport was incorporated in August, 1980, and began operations in February, 1981. Emeryville leased trucks to Team, supplied drivers, and solicited business for Team. Gradually, Emeryville increased the number of trucks that it leased to Team and decreased those leased to Helms. By September 1981, when it cancelled with Helms altogether, there were 35 trucks leased to Team and just over 60 leased to Helms.

Team had been formed by Phil and John Rezzetano and by Phil Bateman. Attorney Sam DeLisi testified through deposition that Phil Rezzetano met with him to arrange for the foundation of Team and to process the ICC application, an arrangement which Phil Rezzetano incredibly denied. Bateman is the owner of Teams's 30,000 shares of stock. The capital for Bateman's purchase of that stock was furnished by Phil and John Rezzetano, who held the stock as security for the loan to Bateman, and who had the option to purchase 31,000 additional Team shares. The Rezzetanos could veto the issuance of more Team stock, and had the right to provide consulting services to Team. Two of the Rezzetanos' children are on Team's board of directors.

Bateman was a sincere and very credible witness. He was refreshingly straightforward in his testimony. He testified that he and the Rezzetanos had decided that Team would be a nonunion operation because it was easier to operate without a union and because of the high costs of the National Master Freight Agreement.

None of the information about Team came freely from the Rezzetanos, which does not enhance their credibility.

you're through. . . . *If* I have to lay off half this fleet or sell 50 trucks to get to you, I will get to you. You are done. I'm sorry I ever hired you. You're nothing but trouble, and you're behind every bit of trouble we have at this terminal." Driver Townsend witnessed this, and recalled that Phil Rezzetano then stated that he was not going to let anyone tell him how to operate or run his business or his trucks.

This presaged for Packer what his fate would come to be, for when it came time to collect on the grievance:

> (Phil) said, if you take the check for this grievance you are through. . . . You are not working here. Clean out your truck. We (sic) said, are you firing me? He said, no, I am laying you off. We (sic) said, you can't lay me off. There are 30 people below me, and he said, I will lay off every one of them to get to you. I am going to show you what principals (sic) are. I will not lose control of my trucks, . . I can't have any driver telling me what to do with those trucks, and you can take the check. You're done. Clean it out. . . . I won't lose control of my trucks, and I don't care what I have to do. . . .

After giving Packer his check, Phil Rezzetano called in his secretary and directed her to call every driver below Packer on the seniority list and tell them that they were laid off. John Rezzetano told Packer that he was one of the top drivers that they had, "but we are not going to lose control of the trucks." As the other drivers were in the process of being told that the trucks they were driving were no longer leased to Helms, several were told by Rezzetano that Packer's deadhead grievance was the cause.

An incident that occurred between the time of the grievance hearing and Packer's layoff shows that Packer

was not the only driver threatened for appearing to jeopardize the Rezzetanos' control of their trucks. Driver David Brown, aware that Helms had issued instructions that drivers were not permitted to trip lease to a newly formed Rezzetano company called Team Transport, questioned whether he could do so after being instructed by Emeryville to take just such a trip lease from Team. When word of Brown's inquiry reached Phil Rezzetano he called Brown in to tell him that Brown was not to concern himself with whose loads he was told to drive, "that they were his trucks and he would load them the way he wanted them loaded and nobody would tell him how to operate his vehicles and that he would do what he wanted when he wanted and he would get rid of anybody that stood in his way."

What are we to conclude from the Rezzetanos' fixation on control of their trucks? I conclude that whatever rights of control that were vested in Helms over the drivers who drove for it and Emeryville, and there is no denying that those rights were substantial by virtue of Helms' collective bargaining agreement obligations and rights, Emeryville in fact exercised actual daily control over working conditions that affected where the drivers would go, whether they could take certain loads (upon which their remuneration depended), and, above all, whether they would be working or laid off. The latter was exercised through Emeryville's power to cancel their trucks' leases, a power that it proved was not in the least theoretical.

There were other indicia of control over working conditions as well. Emeryville issued written driver work rules that provided that "failure to [call in daily for Emeryville's trip permission] will result in immediate discharge." Failure to follow various other rules pertaining to property

care, record keeping, and maintenance would after the second violation "lead to termination," as would violation of a variety of other rules and instructions. Permission for using vacation or sick leave was to come from Emeryville, which also supervised all of the Paperwork—logs, forms, expense sheets, and grievance processing—that attended the drivers as they would check in and out.

Driver Brown had been right to question some of the Emeryville directives that ran counter to Helms' general or specific, policies, instructions, or practice, for in fact there was some question about whether Emeryville's practice of diverting its drivers from Helms' loads was proper practice under the agency agreement between Helms and Emeryville. But Helms allowed these apparent breaches, perhaps because it too was deviating from its agreement with Emeryville, as we shall later see. The point here is that Helms was an absent employer. Packer's testimony makes the point well:

> Q. Was this a dispute that arose on one or more than one occasion concerning who the drivers were employed by?
> A. That was a constant dispute, sir.
>
> Q. And could you describe the dispute for us?
> A. It was just the Rezzetanos' contention that people work for Emeryville, that they didn't work for Helm's. And I tried to tell people that, without much success, that they worked for Helm's.
>
> Q. Why did you do that?
> A. Because I thought that Helm's was a signator to the contract and that's who we had to basically file grievances with, even though you were getting paid by the Rezzetanos on the grievances sometimes, and that Emeryville didn't have—they didn't have a name on

the contract. Even though they were an employer of sorts, they didn't have a name on the contract.

Q. And what was Phil and John Rezzetano's position that you are aware of? What did they say?
A. A very constant position that we didn't work for Helm's, that we worked for Emeryville Trucking, that Emeryville would tell us what to do, where to go, how to go there, how to run the truck, whether to load the truck, and that was our loyalty. And we had no loyalty whatsoever to Helm's, and we should pay no attention to anything that Helm's said.

Q. Could you describe, as a driver, what contacts—work related contacts you would have with management of Emeryville and what work related contacts you would have with management or supervisors of Helm's?
A. I had daily contact. Sometimes, many times during the day, contact with Emeryville employees, certainly out of Warrendale and their employees out of Gary terminal, also.

Q. You are saying Emeryville employees who—
A. Emeryville dispatchers. That was my constant contact. That was my supervision. That's who told me what to do. I virtually had no contact with Helm's with the exception of whether I had to file a grievance for detention pay or something like that. I would then file it, and they might be at a grievance hearing. That was it.

Q. Could you give us some examples of the type of directions you had received from Phil or John Rezzetano and also the dispatchers?
A. Received directions on everything from orders about changing my own tires tc being responsible for maintenance on the truck, not that I should do it all—

> not that I should do most of it, but to make sure it got maintained to checking my air pressure, to when I would deliver in some places, as to what loads I would put on, as to where I would run, as to whether or not I would be disciplined if I failed to obey their rules. I mean all of the things that normally happened, plus some. They like to post a lot of rules.

Emeryville exercised the authority to assign, direct and supervise the work of Helm's drivers. Thus, for all practical purposes the drivers who were nominally employed by Helms reported to and drove for Emeryville, cf. *C.R. Adams Trucking, Inc.*, 262 NLRB 563 (1982), which could and did "meaningfully affect" significant matters relating to their employment, *Laerco,* supra.

II. The Cancellation of the Truck Leases Affecting (Packer and the 30 Drivers Junior to him

On 14 September 1981, driver Mel Packer went with union representative Hammel to Emeryville's office to pick up the check that the grievance panel had awarded him after Packer was forced by Emeryville to turn down two loads and to deadhead home. As Phil Rezzetano admitted in his testimony, he "blew up" at Packer, yelling "I'll give you the check, but you're out of a job because I'm cancelling my equipment, and I'm cancelling your truck." "I just went nuts, I guess." When told by Hammel that Packer was senior to many drivers, he ordered that the truck leases with Helms of every truck whose driver was junior to Packer be cancelled. Two weeks later Helms acknowledged the cancellations and laid off the drivers.[4]

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[4]I find immaterial the one difference between Packer's and Rezzetano's versions of this episode, i.e., whether Phil used the term "layoff."

Emeryville does not dispute this, and without more there would clearly be a violation of Section 8(a)(3) of the Act for causing layoffs in retaliation for the filing of a grievance under a collective bargaining agreement. *Royal Development Company, Limited,* 257 NLRB 1168, enf. in pertinent part 703 F.2d 363 (9th Cir. 1983). Thus, in *Boston Mutual Life Insurance Company,* 259 NLRB 1270, 1279 (1982), the Board stated:

> It is well established that grievance filing is within the umbrella of the Act's protection. The underlying rationale of this principle is designed to promote the viability of collective bargaining. It assures employees of maximum benefits of their collective bargaining agreement. E.g. *Crown Wrecking Co., Inc.,* 222 NLRB 958, 962-963 (1976). Indeed, the right to file grievances, and have them adjusted, is explicitly granted in Section 9(a) of the Act.

And, of course, see *NLRB v. City Disposal Systems,* ___ US ___ 104 S. Ct. 1505 (1984), reaffirming that such activity is concerted activity under Section 8(a)(1) of the Act (in addition to, here, being union activity under Section 8(a)(3)). Thus far, then, the General Counsel has established a prima facia case for finding both a Section 8(a)(3) and Section 8(a)(1) violations, see *Wright Line,* 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp.,* ___ US ___ (1983), 103 S. Ct. 2469 (1983).

But Emeryville, while not denying the deed, denies that it caused the layoffs, for three reasons: (1) that it was not the drivers' employer, (2) that the truck leases would have been cancelled for business reasons regardless of the Packer grievance and (3) that there were in fact no layoffs until Helms acted independently to lay off the drivers. The

first argument having been disposed of above, we turn to the latter two.

A. Emeryville's Business Justification

Emeryville argues that in any event the truck leases with Helms would have been cancelled because of the deterioration in its relationship with Helms that occurred during the summer of 1981. That deterioration began just before 1981 when Helms brought in a new general manager, Haggard, who set the tone for the future by announcing that the Helms-Emeryville agency agreement "stinks." Shortly after that Haggard advised Emeryville by letter that he was closing Emeryville's Gary, Indiana, station. This was for the purpose of Helms opening another agency station at Gary.

Subsequently, Haggard apologized and rescinded that letter. Nevertheless, Emeryville learned that Helms had indeed opened another Gary agency, the Drake agency, which solicited freight for Helms in Emeryville's territory, even in competition for the same important steel-shipping customer. Moreover, Haggard also began the practice of unilaterally withholding three percent of Emeryville's lease rentals for no other reason than "I'm doin' it because I want to do it."

At a Helms-Emeryville meeting on 30 July 1981, it seemed to Emeryville that Haggard was using the three percent withholding as a hostage to secure Emeryville's approval of the competitive Drake agency. After extended discussions Phil and John Rezzetano agreed to permit the Drake agency to operate as a trip lease station without any solicitation of business from any of Emeryville's customers and with payment to Emeryville of a one percent override

on Drake's business. Haggard promised to prepare a written addendum to the agency agreement reflecting the understanding reached at the meeting with respect to the Drake agency.

Several weeks after the meeting, Emeryville had not received the written addendum. Repeated telephone calls from Phil Rezzetano to Haggard went unanswered, and in Rezzetano's words, "the aggravation was just becoming unbearable for me." In early August of 1981, the Rezzetanos learned that Helms had notified Bethlehem Steel in Gary, Indiana, a major Emeryville customer, that future dealings should be through the Drake Agency, which was identified in the letter as "our agent in Hammond, Indiana." The letter, which was dated 13 August 1981, was signed by Bill Engle, the assistant general manager of the Astro Division of Helms Express. A copy of the letter was sent to Roy Haggard. This letter was in direct conflict with the assurances that the Rezzetanos received from Haggard during the 30 July 1981 meeting.

On 9 September 1981, five days before Phil Rezzetano "blew up" at Mel Packer, Helms' Brumfield went to Emeryville with an addendum to the agency agreement, which the Rezzetanos refused to sign because it did not reflect the 30 July agreement and because of the intervening events. Brumfield promised to straighten things out with Haggard.

On 11 September, Emeryville received a letter from Haggard that did not contain the one percent override and the no competitive solicitation conditions that Emeryville had extracted at the 30 July meeting as its price for agreeing to the Drake agency.

Both Rezzetanos testified that they met at Phil's home on Sunday, 13 September to discuss their Haggard problems, resolved to cancel one-half of their leases with Helms "to get someone's attention", and were in the very process of deciding which ones on Monday morning (i.e., trying to decide which of its drivers would not mind being transferred to Team Transport, the nonunion company that had been formed earlier in 1981 by the Rezzetanos and Bateman), when Packer walked in with Hammel to be paid on his grievance. Respondent's theory is found on brief, p. 17:

> On the day before Packer and Hammel walked into Emeryville's offices demanding payment of the Packer grievance award, Phil and John Rezzetano had already decided to cancel Emeryville's relationship with Helms. They decided to do it in two stages, by cancelling approximately one-half of the truck leases on the following morning and, if this "drastic" action did not cause Helms to promptly resolve its differences with Emeryville, then to cancel the remaining leases and the agency agreement (Tr. 412-13, 432, 507-10). Thus, if Packer and Hammel had not walked into Emeryville's offices on the morning of September 14, 1981, approximately the same number of truck leases would have been cancelled, although probably not the identical ones (Tr. 417, 431-32).

This is all too pat, and I do not credit it. I particularly do not credit it because the testimony of Phil, who was the more glib, was clouded in a verbal smokescreen of evasion and self-serving, and that of John was like the figurative pulling of teeth. Contradictions abound, particularly on exactly when a decision was made to cancel the agency agreement, and on what role they had in helping Bateman start up Team. So impressed am I with their lack of candor

that I have put no faith in their account of their private meeting on 13 September. Thus, while it is true that Emeryville was being provoked by Helms, it is not true that the truck leases were cancelled on 14 September for that reason. The provocation that caused the cancellations came from Packer, who was perceived in Phil Rezzetano's eyes as a troublemaker.

Phil Rezzetano had let that particular cat out of the bag when, after the 21 July grievance hearing he threatened Packer that "I will get to you. . . . You're nothing but trouble, and you're behind every bit of trouble we have at this terminal." The "trouble" was because Packer had often, and vigorously, encouraged and aided other employees to file grievances. After one such grievance involving driver Ostroff in July 1980, Phil Rezzetano told Packer that he should not have helped Ostroff, and in a rage threatened Packer "if I have to pay anything on this grievance, I am going to get you." If one has a sense of deja vu regarding this episode it is because we know that twelve months later Rezzetano yelled that at Packer again, this time about Packer's own grievance.[5]

All of this pent up resentment at Packer's "troublemaking" came to the fore on 14 September 1981 when Phil finally made good on his threats to get rid of Packer, no matter that to do so meant getting out of the way the drivers who stood in the way on the seniority list by cancelling the leases to Helms of their trucks as well as Packer's. After Rezzetano laid off Packer, Rezzetano told

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[5]Earlier in 1981 Phil Rezzetano, angry that Packer had helped driver Little file a grievance, threatened Packer, who was out on medical disability, that "I hope you don't think you are coming back to work here because there is probably not going to be a truck when you come back. . . .

the other laid off drivers that their truck leases had been cancelled "to get to Mel Packer" and that Rezzetano could not have people filing for deadhead money on him. Driver Vuchinich was told to apply at Team Transport or take the layoff with Emeryville. In fact, all of the laid off drivers other than Packer were told or heard that, and all but five elected to apply at Team.[6] In these circumstances it matters not at all whether Emeryville had it in mind to cancel some leases with Helms to focus attention on its problems. What does matter under Section 8(a)(3) of the Act is that Emeryville cancelled the lease on Packer's truck and 30 others in order to rid itself of a union activist. By so doing, Emeryville discriminatorily caused the layoff of 31 drivers (named below).[7]

B. Did Helms or Emeryville lay off the Drivers?

Emeryville argues that it was Helms that laid off the drivers, not it. In fact, on 29 September Helms sent two letters, one to Emeryville that "accepted the voluntary cancellation of the permanent lease agreements with the Astro division on (31) units . . . effective this date," and another letter to 32 drivers[8] stating that "due to the fact that

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[6]Helms, too, told the drivers that they were on layoff status after it accepted the lease cancellations, since there was no further work for these drivers at the Warrendale terminal.

[7]Because the record contains at best only speculation whether Emeryville would have parted from Helms if Packer's grievance had not catalyzed events, the backpay that is due Packer and the drivers named below shall be calculated from 14 September 1981 to 31 December 1982, when Emeryville's agreement with Helms expired by its terms. The reason for the backpay will be to make the drivers whole for losing the pay rate and benefits provided in the collective-bargaining agreement between Helms and the Union.

[8]By stipulation the parties agreed that the following 31 drivers received lay off notices from Helms (but see exhibit GC-10, which lists

(Continued on next page)

Emeryville Trucking Inc., the owner of the equipment you drive for the Astro Division, has cancelled the permanent lease agreement on that equipment, we are forced to place you on a layoff status until further notice, effective this date." As far as Emeryville is concerned Helms did not have to lay off the drivers because Helms had another source of trucks at the Warrendale terminal, those of owner Robert Short, another Helms lessor. But Short had only 14 trucks then, and Emeryville had cancelled the leases of 31 trucks.

Emeryville offered all the drivers but Packer employment at Team,[9] and all but four went there. So as far as Emeryville is concerned, Short's trucks were available to Helms for Packer and the other four, and the reason that Helms did not use them was Helms' own anti-union animus. While there are juicy tidbits in the record that suggest Helm's anti-union animus (such as its initial refusal to employ Packer), the conclusion proffered by Emeryville is speculation. What we know is that Short already had four

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(Continued)

32 drivers): Dennis Baker, Floyd Baldwin, Lonnie Bemis, Terry Begley, Charles Bronson, David Brown, Steve Caltagirone, Tom Chapot, Donald Disko, Anthony Elkins, Charles Gerson, Gary Hussey, Tom Joyce, Lewis Linhart, Guy McCool, Donald Miller, David Miller, Harry Mulder, William Oliver, John O'Sche, Melvin Packer, Harold Parks, Wallie Rohrer, Mark Ross, David Schirm, Shane Schandeimeier, Robert Stahura, John Stromberg, James Tomcho, Gary Vuchinich, and Tom Writt.

[9]This singling out of Packer was discriminatorily motivated to get rid of Packer altogether, completing the making good on the threats to "get" Packer for filing his grievance and having helped other drivers to file grievances. This constitutes an independent violation of Section 8(a)(3). As requested by the General Counsel, who seeks the reinstatement only of Packer, Emeryville will be required to offer employment to Packer at Emeryville/Team, and backpay will run from the date of layoff to the date of offer of employment.

trucks idle at a time and in a place where unemployment was high. While Short opined on direct examination by Respondent that Packer and the other four could have made money if they had been transferred to his trucks, in fact business at Warrendale was slow and was getting slower. By the end of 1982 Helms had cancelled its leases with Short and had closed its Astro Division. But apart from this general decline, the impact of the Emeryville lease cancellations and termination of the agency agreement was specific and immediate, as Helm's operations manager Colinear testified:

> Q. (on redirect examination by the General Counsel) What is the affect (sic) of the cancellation of the leases and the agency agreement, on the availability of work, at Warrendale?
>
> * * *
>
> THE WITNESS: Once Emeryville cancelled, we had no agent. There were still a few domiciled operators, but in essence, we had no one soliciting business for us, at Warrendale.
>
> Q. Okay, so, what did that mean, as far as the work that was available for employees?
>
> A. There wasn't any.
>
> Q. And, I believe, you testified, under cross-examination about equipment, roughly, around five pieces of equipment, of Short's, that was sitting idle, even before the cancellation. Why was it sitting idle, at that point? To you knowledge?
>
> A. Number one, he had no drivers. Number two, he wasn't makin' any money on the units that he was runnin'. If you would—if we had his figures, I'm sure it would indicate that Mr. Short wasn't

> setting the world on fire, with the equipment he was running, let alone putting the other five, on the road.

In addition to expressing this lack of confidence by Helms in Short, Colinear testified that Helms had another Pittsburgh area agent, in Adamsburg, and that no other agents in western Pennsylvania were added.[10]

In short, for Helms (1) there was slack at the Warrendale terminal after Emeryville, which was Helm's Astro Division's largest revenue producer, left Helms without an agent there, and (2) Helms was sufficiently confident in Short to have him replace Emeryville. Therefore, I find no basis in Helm's conduct for exonerating Emeryville from the consequences of causing the layoff of Packer and 30 other drivers.

III. The Second Round of Lease Cancellations

On 24 September 1981 Emeryville sent Helms a letter that stated "we will consider our arrangements terminated" as of 30 September 1981. This meant that Emeryville was terminating its remaining truck leases and the agency agreement. Helms acknowledged this by its letter of 28 October 1981, listing the 31 truck leases to be cancelled, and sent a letter to the drivers of those trucks that they were on lay off status because of the cancellations. The General Counsel alleges that these layoffs, like those on 14 September, were the result of Emeryville's discriminatorily motivated lease cancellations. I find that they were not.

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[10]In view of the fact that the Helms-Emeryville relationship deteriorated to the point of a civil suit, one must be careful with Colinear's testimony. I found him to be forthcoming in areas that did not touch on the initial rejection by Helms of Packer's driving application, a situation that appeared to embarrass him. Regarding the remaining matters of his testimony I found him to be a knowledgeable and credible witness.

To understand what was going on we must retrace our steps back to 14 September. Throughout 1981 and up to 14 September, two persons had been trouble to Phil Rezzetano—Roy Haggard and Mel Packer. Haggard had set Helms and Emeryville on a collision course, and Packer's union activities had threatened Rezzetano's perception of who was going to control his trucks. These separate problems intertwined on 14 September when Packer came to collect on his grievance. Phil Rezzetano made good on what he had threatened Packer and had told Bateman and Colinear. He "got" Packer, and in an admitted fury did so by cancelling every truck lease of every driver that was below Packer on the seniority list.

That brings us to the remaining cancellations. When the dust settled and Phil calmed down, he and John Rezzetano discovered that in Phil's rage exactly one-half of the truck leases had been cancelled. They realized that they had done something that would "get someone's attention" at Helms and awaited a conciliatory response. None came. During the next two weeks Helms made no effort to contact Emeryville to patch up their differences. After consulting counsel, Phil Rezzetano called Colinear at Helms and said "no one seems to care, I'm cancelling the remaining leases." Colinear said before you do that "let me get a hold of Brumfield and Haggard, and have them call you." Phil said, "fine, have them call me." However, no one ever called back, and Phil then sent the final termination letter cancelling the remaining leases and the agency agreement.

The General Counsel argues that the reason Emeryville terminated with Helms was to move sooner into a nonunion operation with Team and, incidentally, to be away from the union contract Helms had under which Packer might grieve his layoff and win.

But, I find that once Emeryville discriminatorily cancelled the first round of leases, the second round of leases and the agency agreement were cancelled as an independent business decision. Doubtless Emeryville was now free of Packer and the Union, and that this was in the Rezzetanos' minds when they cancelled on 24 September by phone to Colinear and by letter to Haggard. But Colinear's testimony does provide corroboration that on the second round of lease cancellation, Emeryville threw in the towel on Helms because Helms was paying no attention. I see it as a business decision that is separate from the first round of cancellations and that "would have taken place even in the absence of the protected conduct." *Wright Line,* supra, 251 NLRB at 1089. Other than surmise that the timing of the second round of cancellations ten days later was to thwart a Packer grievance or had other anti-union animus, there is no record support for finding that the second round was not done out of frustration with Helms, which had made no effort to reconcile the differences on which Emeryville had been seeking redress since July. Once the Packer grievance triggered the first round of cancellations, there is no knowing when the second round would have come, if at all. Accordingly, I dismiss the complaint on this issue.

Conclusions of Law

1. Emeryville Trucking, Inc. is an employer engaged in commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act, 29 USC Section 152.[11]

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[11]During 1981 Emeryville derived gross revenue in excess of $50,000 from the transportation of freight and commodities in interstate commerce.

2. By causing the layoff of the above-listed drivers that it jointly employed with Helms Express in retaliation for having to pay a grievance award that was made pursuant to a collective-bargaining agreement between the drivers' union and Helms Express, Emeryville violated Sections 8(a)(3) and 8(a)(1) of the Act, 29 USC Section 158.

3. By causing the layoff of Melvin Packer in retaliation for his having aided other drivers in the filing of grievances under the collective-bargaining agreement between their union and Helms Express, Emeryville violated Sections 8(a)(3) and 8(a)(1) of the Act, 29 USC Section 158.

4. By failing to offer Melvin Packer employment at Team Trucking, Inc. in order to be rid of a union activist, Emeryville violated Sections 8(a)(3) and 8(a)(1) of the Act, 29 USC Section 158.

ORDER[12]

Respondent Emeryville Trucking, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off or causing the layoff of drivers because of their union activities.

(b) Laying off or causing the layoff of drivers because they have filed grievances or aided other employees in the filing of grievances.

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[12]In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Failing to offer employment or the opportunity to transfer employment to employees because of their union activities or because they have filed grievances or aided employees in the filing of grievances.

(d) In any like or related manner interfering with, restraining or coercing employees in their rights under Section 7 of the act, 29 USC Section 157.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer employee Melvin Packer employment at Emeryville Trucking or Team Trucking, and make him whole for any loss of pay and benefits suffered by reason of Emeryville having caused the layoff of Packer.[13]

(b) Make whole the drivers listed above for any loss of pay and benefits that they suffered by reason of Emeryville's having caused their layoff.

(c) Post at its Warrendale, Pennsylvania, terminal copies of the attached notice, attached hereto as the Appendix.[14] Copies of the notice, on forms provided by the Regional

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[13]See *F.W. Woolworth Co.*, 90 NLRB 289 (1950), *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

[14]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this notice what steps the Respondent has taken to comply.

Dated at Washington, DC, June 24, 1985.

.....

Burton S. Kolko
Administrative Law Judge

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and to abide by this notice.

Section 7 of the Act gives employees these rights:

> To organize
> To form, join, or assist any union
> To bargain, collectively through representatives of their own choice
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT layoff or cause the layoff of employees who file grievances or who help other employees file grievances, or who engage in union activities.

WE WILL NOT refuse to employ or refuse to transfer employees who engage in union activities.

WE WILL offer employment to driver Melvin Packer.

WE WILL pay backpay with interest to the following drivers whose layoffs we caused by cancelling truck leases with Helms Express:

Dennis Baker
Lonnie Demis
Charles Bronson
Steven Caltagirone
Donald Disko
Charles Gerson
Tom Joyce
Guy McCool
David Miller
William Oliver
Melvin Packer
Wallie Rohrer
David Schirm
Robert Stahura
James Tomcho
Tom Writt
Floyd Baldwin
Terry Begley
David Brown
Tom Chapot
Anthony Elkins
Gary Hussey
Lewis Linhart
Donald Miller
Harry Mulder
John O'Sche
Harold Parks
Mark Ross
Shane Schandeimeier
John Stromberg
Gary Vuchinich

EMERYVILLE TRUCKING, INC.

.....
(Employer)

Dated ..... By .....
(Representative) (Title)

United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD

EMERYVILLE TRUCKING, INC.		
and	}	Case 6—CA—14900
MELVIN PACKER, an Individual		

SUPPLEMENTAL DECISION AND ORDER

On 24 March 1986 the Board issued a Decision and Order in this case[1] adopting the administrative law judge's finding that the Respondent, a truck leasing company, violated Section 8(a)(3) and (1) of the Act when on 14 September 1981, in retaliation for a grievance filed by driver Melvin Packer, in canceled 32 truck leases with its joint employer, Helms Express, forcing the discriminatory layoff of Packer and 30 drivers his junior; independently violated Section 8(a)(3) and (1) of the Act by discriminatorily failing to offer Packer employment with Team Transport, a nonunion trucking operation formed by the Respondent's owners; but did not violate the Act when on 30 September 1981 it canceled its remaining 30 truck leases and its agency agreement with Helms and forced the layoff of 30 more drivers. The Board agreed with the judge that Packer should be offered employment at Emeryville/Team, and backpay from the date of his layoff until such offer of employment, and that the 30 other drivers discriminatorily laid off and subsequently offered positions with Team should receive backpay calculated from their 14 September

[1] 278 NLRB No. 153 (1986).

1981 layoffs to 31 December 1982, the date the Respondent's agreement with Helms would have expired by its terms.[2]

The Respondent filed with the Third Circuit Court of Appeals a petition for review of the Board's Decision and Order and the Board filed a cross-application for enforcement. Subsequently, on 12 August 1986, the Board filed with the court a motion for leave to withdraw, without prejudice, the record and for dismissal, without prejudice, of the petition for review, or alternatively for suspension of the briefing schedule to allow the Board to reconsider, sua sponte, its Decision and Order. On 24 September 1986 the court granted the Board's motions.

On 6 October 1986 the Board invited the parties to file statements of position. The General Counsel and the Respondent filed timely statements.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered this case in light of the record and position statements and for the reasons set forth below has decided to reaffirm its earlier Decision and Order adopting the judge's findings, but only to the extent consistent with this Supplemental Decision and Order.[3]

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[2]Member Johansen would have terminated the drivers' backpay 30 September 1981, the date the Respondent terminated its relationship with Helms.

[3]We shall clarify the Order and notice to conform with our adoption of the judge's finding that the Respondent discriminatorily denied Packer employment following his unlawful layoff and that as a result Packer is entitled to an offer of employment by Emeryville/Team, and backpay from the date of layoff to the date an offer of employment is made.

Our focus on reconsideration is the inconsistentency between the judge's treatment of the 30 September 1981[4] layoffs as a separate event for the purpose of determining whether these layoffs were unlawful and his finding in connection with the backpay due those laid off 14 September 1981 that the second round of layoffs was "catalyzed" by the first.

A brief restatement of the credited facts is warranted. Packer filed and won a grievance protesting a practice the Respondent viewed important to its operation. In retaliation, on 14 September the Respondent canceled 32 truck leases with Helms, causing the layoff of Packer and 30 drivers his junior.[5] Following these layoffs, the Respondent realized it had done something that would "get someone's attention" at Helms and awaited a response. When none came, Phil Rezzetano, one of the Respondent's owners, called Helms and said, "(N)o one seems to care, I'm cancelling the remaining leases." When again no one from Helms responded, the Respondent sent a 24 September termination letter canceling the remaining leases and the agency agreement effective 30 September.

The judge found the layoff of Packer and 30 other drivers resulting from the 14 September lease cancellations was discriminatorily motivated, and for the reasons stated by him we continue to agree. The judge treated the second round of lease cancellations as a separate event, and finding no evidence that these cancellations were "to thwart a

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[4]All dates are in 1981 unless otherwise indicated.

[5]Although certain evidence indicates that a total of 32 drivers were laid off, the parties stipulated to the names of 31 drivers, including Packer, who received layoff notices as a result of the Respondent's 14 September action.

Packer grievance or had any anti-union animus" concluded the leases were canceled as of 30 September as an independent business decision" stemming from differences which Emeryville had been unable to resolve with Helms since July, and therefore were lawful. The judge, however, found that since the record contains at best only speculation whether Emeryville would have parted from Helms on 30 September if Packer's grievance had not "catalyzed" events, backpay for the unlawful 14 September layoffs should extend to the date Emeryville's agreement with Helms expired by its terms, rather than the date the Respondent terminated its relationship with Helms. We find the judge made a correct assessment of the record when he considered the backpay issue and, in determining the legality of the 30 September layoffs, we now conclude that since the second round of cancellations was accelerated by the Respondent's unlawful acts of 14 September, it also violated Section 8(a)(3) and (1) of the Act.

Packer's grievance, and the first round of retaliatory layoffs which followed, set other events in motion. These layoffs prompted the Respondent to more carefully evaluate its relationship with Helms, and when Helms' lack of response to the layoffs suggested indifference, the Respondent canceled the balance of its truck leases and the agency agreement with Helms. While the Respondent's relationship with Helms had become frayed even before the Packer grievance, there is nothing to indicate that absent the discriminatory 14 September layoffs, the Respondent would not have continued the balance of the Helms leases to term. In these circumstances, we find the General Counsel has established that the Respondent terminated the balance of the truck leases with Helms on 30 September as

a result of the unlawful 14 September layoffs. Such conduct, which caused the layoff of 30 additional drivers, must be found to violate Section 8(a)(3) and (1) of the Act, unless it can be shown that an independent intervening event caused the second round of cancellations.

The Respondent has failed to point to any independent intervening event which can be relied on to fix the date the Respondent would have terminated its relationship with Helms had the Packer grievance not provoked the first round of cancellations.[6] In fact, by Owner Phil Rezzetano's admission, the second round of cancellations were precipitated by one factor—the failure of the 14 September cancellations to get someone's attention at Helms. Relevant testimony, not discussed by the judge, also establishes that while the Respondent had contemplated terminating its relationship with Helms at some indefinite date in the future and leasing its trucks to Team Transport, the nonunion operation owned by the Rezzetanos, the Packer grievance influenced, and in fact accelerated, that event. Philip Bateman, president of Team Transport, was found by the judge to be a "sincere and very credible witness." Bateman testified that "just prior to the split between Emeryville and Helms" he had a conversation with Owner Phil Rezzetano about the Packer grievance. According to Bateman, P. Rezzetano said the difficulty involving Packer was one of the reasons he was breaking with Helms. P. Rezzetano gave as another reason his contractual disagreements with Helms. Robert Townsend, a Helms/Emeryville driver, was not one of those laid off 14 September. His testimony, while not discussed by the judge, is consistent

[6]As the judge found, "[o]nce the Packer grievance triggered the first round of cancellations, there is no way of knowing when the second round would have come, if at all."

in many respects with that of other credited witnesses. According to Townsend, on reporting back to work 21 September, after being out for several weeks with a physical injury, he had a conversation with Owner John Rezzetano at the Respondent's Warrendale terminal. J. Rezzentano explained that the lease on Townsend's truck was canceled and that if he wanted to work, it would be with Team Transport. J. Rezzetano said, "[T]hey hadn't intended on going over. They were eventually going to go all to Team. They didn't want to do it at this time or this quickly, [but] because of the incidents leading up to this situation or incidents leading up to this that they were forced to go over to Team a little sooner than anticipated." The incidents J. Rezzetano referred to as pressuring him to make the changes sooner than anticipated were "Mel Packer and Helms."[7] The Respondent's written notice of its intent to cancel the remaining leases and the agency agreement was sent to Helms within days of this conversation. The above evidence, including the testimony of P. Rezzetano, accentuates that the Respondent's 14 September cancellation of half of Helms' truck leases, and not any independent intervening event, catalyzed the reassessment of its already deteriorating relationship with Helms, and prompted the Respondent to accelerate its break with Helms.[8] Under these circumstances we cannot find that the cancellations effective 30 September would have taken place on that date even in the absence of the Packer grievance and the first round of unlawful layoffs triggered by it.

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[7]After 21 September Townsend's truck was leased to Team Transport.

[8]See generally *Carbonex Coal Co.*, 262 NLRB 1306, 1324 (1982); *Ox-Wall Products Mfg. Co.*, 135 NLRB 840 (1962), enfd. 310 F.2d 878 (2d Cir. 1962).

Accordingly, we find the layoffs of 30 September were a result of the Respondent's earlier unlawful conduct and also violated Section 8(a)(3) and (1) of the Act.[9]

Amended Conclusions of Law

Substitute the following for Conclusion of Law 2.

"2. By causing the 14 September 1981 layoff of 30 drivers that it jointly employed with Helms Express in retaliation for having to pay a grievance award that was made pursuant to a collective-bargaining agreement between the drivers' union and Helms Express and, as a result of these layoffs, causing the 30 September 1981 layoff of 30 additional drivers jointly employed with Helms Express, Emeryville violated Section 8(a)(3) and (1) of the Act."

Amended Remedy

Having found that the Respondent's layoff of 30 drivers on 30 September 1981 violated Section 8(a)(3) and (1) of the Act, and given that the General Counsel states that all laid-off drivers, but Mel Packer, were offered employment with Team Transport, we shall afford those laid off 30 September 1981 the same relief provided by the judge to those discriminatorily laid off 14 September 1981. Specifically, we shall direct the Respondent to make whole the 30 drivers unlawfully laid off 30 September 1981, with backpay through 31 December 1982, the date the

[9]In reaching this conclusion we do not disturb the judge's finding, which we previously adopted, that the record fails to show any specific discriminatory motivation for the second round of cancellations. No such evidence is necessary where it has been established, as in this case, that an action adversely affecting employees' terms and conditions of employment came about as a result of unlawful acts, rather than as a result of completely independent lawful events.

Emeryville-Helms agreement would have expired by its terms. We note that the General Counsel seeks this limited remedy and, given that the relationship between Emeryville and Helms had deteriorated over the summer of 1981 and the Respondent had contemplated terminating that relationship even before the Packer grievance triggered the Respondent's above-discussed unlawful conduct, we find the remedy sought would be restorative, without being punitive.[10] We also modify the remedy to provide interest as set forth in our decision in *New Horizons for the Retarded.*[11]

ORDER

The National Labor Relations Board orders that the Respondent, Emeryville Trucking, Inc., Warrendale, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or causing the layoff of drivers because they have filed grievances, or helped other

---

[10]In the compliance stage of this proceeding the Respondent is free to introduce evidence establishing that factors other than the Packer grievance would have resulted in an earlier termination of some or all of the discriminatees and thereby mitigate its backpay liability. Further, because the list of names of the 30 drivers unlawfully laid off 30 September 1981 is somewhat incomplete, i.e., first names are missing for 6 individuals listed in the amended complaint as being laid off 30 September, we shall leave to compliance the formulation of a more complete listing.

[11]In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. §6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. §6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

employees in the filing of grievances, or have engaged in union activities.

(b) Failing to offer employment or the opportunity to transfer employment to employees because of their union activities or because they have filed grievances or aided employees in the filing of grievances.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employee Melvin Packer immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in footnotes 9 and 13 of the judge's decision.

(b) Make whole the following drivers for any loss of pay and benefits that they suffered by reason of Emeryville's having caused their layoff, with interest:

Dennis Baker	Floyd Baldwin
Lonnie Bemis	Terry Begley
Charles Bronson	David Brown
Steve Caltagirone	Tom Chapot
Donald Disko	Anthony Elkins
Charles Gerson	Gary Hussey
Tom Joyce	Lewis Linhart
Guy McCool	Donald Miller
David Miller	Harry Mulder
William Oliver	John O'Sche
Melvin Packer	Harold Parks
Wallie Rohrer	Mark Ross
David Schirm	Shane Schandeimeier
Robert Stahura	John Stromberg
James Tomcho	Gary Vuchinich
Tom Writt	

(c) Make whole the drivers laid off 30 September 1981 for any loss of pay and benefits that they suffered by reason of Emeryville's having caused their layoff, with interest.

(d) Remove from its files any reference to the discriminatory layoff of drivers 14 and 30 September 1981 and notify each of these drivers in writing that this has been done and that evidence of these layoffs will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Warrendale, Pennsylvania terminal copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[12]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 24 September 1987

.....
Donald L. Dotson, *Chairman*

.....
Wilford W. Johansen, *Member*

.....
Marshall B. Babson, *Member*

(SEAL) NATIONAL LABOR
RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off or cause the layoff of employees who file grievances, or who help other employees file grievances, or who engage in union activities.

WE WILL NOT refuse to employ or refuse to transfer employees who engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Melvin Packer immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of

earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL pay backpay with interest to the following drivers whose layoffs we caused by canceling truck leases with Helms Express:

Dennis Baker
Lonnie Bemis
Charles Bronson
Steve Caltagirone
Donald Disko
Charles Gerson
Tom Joyce
Guy McCool
David Miller
William Oliver
Melvin Packer
Wallie Rohrer
David Schirm
Robert Stahura
James Tomcho
Tom Writt
Floyd Baldwin
Terry Begley
David Brown
Tom Chapot
Anthony Elkins
Gary Hussey
Lewis Linhart
Donald Miller
Harry Mulder
John O'Sche
Harold Parks
Mark Ross
Shane Schandeimeier
John Stromberg
Gary Vuchinich

WE WILL pay backpay with interest to the drivers whose layoffs were caused by the cancellation of truck leases with Helms Express 30 September 1981.

WE WILL remove from our files any reference to the discriminatory layoff of drivers 14 and 30 September 1981, and WE WILL notify each of these drivers that this has been done and that evidence of these unlawful layoffs will not be used for future personnel action against them.

EMERYVILLE TRUCKING, INC.

.....
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William S. Moorhead Federal Building, Room 1501, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2969.

NOT FOR PUBLICATION

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 87-3674 and 87-3764

EMERYVILLE TRUCKING, INC.,
Petitioner in No. 87-3674

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

EMERYVILLE TRUCKING, INC.,
Respondent

vs.

NATIONAL LABOR RELATIONS BOARD,
Petitioner in No. 87-3764

Petition for Review and
Cross-Application for Enforcement
National Labor Relations Board

Submitted Under Third Circuit Rule 12(6)
May 5, 1988
Before: GIBBONS, *Chief Judge,* and MANSMANN and COWEN, *Circuit Judges*
(Filed May 11, 1988)

MEMORANDUM OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In this case we examine a petition for review filed by Emeryville Trucking, Inc. and a cross-application for enforcement of a Supplemental Decision and Order of the National Labor Relations Board. For the reasons stated below we will enforce the Board's Order and deny the petition for review. This court has jurisdiction pursuant to 29 U.S.C. §160(e) and (f).

Emeryville is the owner of a fleet of tractor trailer trucks which it leases to common carriers in the freight hauling business. Emeryville leased 60 trucks to the Astro Division of Helms Express which operated out of Emeryville's Warrendale, Pennsylvania terminal. Each truck was covered by a separate equipment lease, and Helms and Emeryville maintained an agreement under which Emeryville acted as the exclusive agent for Helms in the solicitation of certain freight business. The drivers hired by Helms were union members and while Helms was a member of the Teamsters' National Master Freight Agreement, Emeryville was not.

The dispute in this case arose over the filing of union grievances and other incidents involving driver Melvin Packer. Eventually, Packer and all drivers with less seniority than Packer were laid off and the leases covering those drivers' trucks were cancelled. Emeryville then rehired the laid-off workers with the exception of Packer to work at a non-union affiliate of Emeryville. At approximately the same time that these layoffs occurred, Emeryville had a separate dispute with Helms and another freight soliciting entity called the Drake Agency which resulted in the cancellation of the remaining Helms truck leases.

Upon these facts, the National Labor Relations Board concluded that Emeryville was a joint employer of the drivers with Helms and that Emeryville had violated 29 U.S.C. §158(a)(3) and (1) through the layoff of the drivers and the failure to offer Packer reemployment at Team Transport, the Emeryville affiliate, in retaliation for Packer's protected activity. The Board ordered the offer of reinstatement to Packer, and that Emeryville make whole for loss of pay and benefits the drivers laid off with Packer and those laid off in the second round of layoffs.

The linchpin of this case is the finding that Helms and Emeryville were "joint employers" within the meaning of 29 U.S.C. §152(2). We must determine the factual component of the question of whether Emeryville "possessed sufficient control over the work of the employees to qualify as a joint employer with the actual employer." *N.L.R.B. v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982). *See also Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). The joint employer concept embodies the principle that the companies are independent legal entities who share or co-determine matters governing the essential terms and conditions of employment. *Browning-Ferris*, 691 F.2d at 1122.

We find substantial evidence to support the Board's finding that Helms and Emeryville were joint employers. The record indicates that Emeryville made the initial probationary hiring decisions, primarily controlled the drivers' day-to-day activities including acceptance of proffered loads, administered payroll, vacation and sick pay and at times accepted financial responsibility for union grievances brought against Helms. We thus find ample support for the conclusion that Emeryville was a joint employer of the drivers.

We turn then to the Board's finding that the layoff of Melvin Packer and other workers and the cancellation of the truck leases was in retaliation for Packer's grievance, and therefore in violation of 29 U.S.C. §158(a)(3) and (1). The employer's motive under such circumstances is crucial and is a question of fact to be determined by the Board. *Herman Brothers Inc. v. N.L.R.B,* 650 F.2d 201 (3d Cir. 1981); *see also N.L.R.B. v. Link-Belt Co.,* 311 U.S. 584 (1941).

We find substantial evidence that the layoffs and lease cancellations were discriminatorily motivated in violation of 29 U.S.C. §158(a)(3) and (1). There was direct testimony that the owner of Emeryville told Packer that if Emeryville had to pay for Packer's grievance Packer would be laid off and if necessary all 30 people less senior to Packer would be laid off as well. There was also testimony concerning the owner's statement that he would cancel truck leases if the grievance went through. The record also indicates that Emeryville offered employment at its non union affiliate to all drivers affected by the lease cancellations except Packer. We are therefore satisfied that the layoffs and lease cancellations were motivated by anti-union animus, and therefore violative of the National Labor Relations Act.

In regard to the second round of lease cancellations, we agree with the Board that these too were violative of §8(a)(3)and (1) of the Act. There is substantial evidence to support the Board's conclusion that the first round of layoffs was the catalyst for the final round. Moreover, there were no independent, intervening events which might point to a non-discriminatory rationale for the further cancellations. There was testimony to the effect that Emeryville moved a little more quickly in hiring drivers and otherwise filling out its non-union affiliate because of the

incidents regarding Mr. Packer. Therefore, the second layoffs and cancellations were discriminatorily motivated.

Emeryville argues as well that the Board erred in calculating damages against it. We find no merit in this contention as the Board is empowered with broad discretion to insure that the policies underlying the Act are effectuated. This discretion includes the authority to order such affirmative action as backpay and reinstatement, unless it can be shown that the order is a patent attempt to achieve ends other than those of effectuating the policies of the Act. *See Shepard v. N.L.R.B.*, 459 U.S. 344 (1983). We find no such attempt in this case.

Accordingly, for the reasons stated above, we will deny the petition for review and enforce the Board's order in full.

TO THE CLERK:

Please file the foregoing opinion.

. . . . . .

Circuit Judge

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 87-3674 and 87-3764

EMERYVILLE TRUCKING, INC.,
Petitioner in No. 87-3674

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

EMERYVILLE TRUCKING, INC.,
Respondent

vs.

NATIONAL LABOR RELATIONS BOARD,
Petitioner in No. 87-3764

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, AND COWEN, *Circuit Judges*.

The petition for rehearing filed by Petitioner Emeryville Trucking, Inc. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a

majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

. . . . . .
Circuit Judge

June 9, 1988

(3)

FILED
NOV 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-424

In the Supreme Court of the United States

OCTOBER TERM, 1988

EMERYVILLE TRUCKING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

1810

QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's findings that petitioner was a joint employer of the drivers of trucks leased by it to another employer and that petitioner caused the layoff of those drivers in retaliation for the successful prosecution of a grievance by one of the drivers.

2. Whether the Board abused its discretion by accepting a settlement from the other joint employer and holding petitioner primarily liable for the consequences of its discriminatory actions.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-424

EMERYVILLE TRUCKING, INC., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 91a-95a) has not been reported. The first decision and order of the National Labor Relations Board (Pet. App. 38a-44a), including the decision of the administrative law judge (Pet. App. 45a-73a), is reported at 278 N.L.R.B. 1112. The Board's supplemental decision and order (Pet. App. 76a-90a) is reported at 285 N.L.R.B. No. 132.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1988. A rehearing petition was denied on June 9, 1988. The petition for a writ of certiorari was filed on September 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, which owns a fleet of tractor trailer trucks which it leases to common carriers in the freight hauling business, leased about 60 trucks to the Astro Division of Helms Express (Helms) for a period ending December 31, 1982. The leased trucks operated out of petitioner's Warrendale, Pennsylvania, terminal, and petitioner and Helms maintained an agreement under which petitioner acted as the exclusive agent for Helms in the solicitation of certain freight business. The drivers hired by Helms were union members whose terms and conditions of employment were fixed by the Teamsters' National Master Freight Agreement, to which Helms, but not petitioner, was a signatory. With respect to hiring drivers, petitioner had authority to place an applicant in a 30-day probationary status, while Helms retained the final employment decision. Drivers were paid by payroll checks written by Helms and distributed by petitioner. Helms processed grievances and, for the most part, paid them. Pet. App. 49a-52a.

In addition to its agency and lease agreements with Helms, petitioner had an agreement with U.S. Steel that, on a half day's notice, it would move whatever loads U.S. Steel needed moved. To accommodate that commitment to U.S. Steel, drivers of the leased trucks were required by petitioner, on pain of discharge, to call in for permission before taking on a new load, and were denied permission to take trips that would compromise petitioner's ability to respond to U.S. Steel upon short notice. In February 1981,[1] one such mandatory call-in resulted in petitioner's instruction to driver Melvin Packer, who was in Detroit, to turn down two loads (including a load offered by Helms' agent in Detroit) and to return empty to the Warrenville terminal. Packer did as instructed, but filed a

[1] All dates are in 1981 unless otherwise noted.

grievance under the Master Freight Agreement since his pay depended on transporting loads. Pet. App. 53a, 56a.

Packer's grievance had the potential to establish a precedent that would diminish petitioner's ability to respond promptly to U.S. Steel, and was therefore of considerable concern to petitioner's co-owners, Phillip and John Rezzetano (Pet. App. 53a-54a). In July, after attending the hearing on Packer's grievance, Phillip Rezzetano told Packer that "if I lose that grievance you're through * * * if I have to lay off half this fleet * * * to get to you" (*id.* at 54a-55a, 64a). Packer prevailed, and when he went to petitioner's office to pick up the check for his grievance award, Phillip Rezzetano told him that he was laying him off. When told that Packer was senior to many drivers, Rezzetano ordered cancellation of the truck leases with Helms of every truck whose driver was junior to Packer, resulting in notice to Helms of the cancellation of 31 truck leases. Petitioner notified the 30 drivers junior to Packer that they were laid off, told some of them that their truck leases had been canceled "to get to Mel Packer," and offered all of the affected drivers, except Packer, employment in Team Transport, a non-union company operated by petitioner. *Id.* at 55a, 65a.

On September 21, a driver who had not been laid off on September 14 was told by John Rezzetano that the lease on his truck was canceled, but that he could work for Team Transport. John Rezzetano said that they had planned to move all the drivers to Team Transport. He added that "[t]hey didn't want to do it at this time or this quickly, [but] because of the incidents leading up to this situation * * * they were forced to go over to Team a little sooner than anticipated." He explained that the incidents he referred to were "Mel Packer and Helms." Pet. App. 81a. At about the same time, Phillip Rezzetano told Philip Bateman, Team Transport's president, that petitioner's

difficulty involving Packer was one of the reasons he was breaking with Helms (*id.* at 80a).[2] On September 24, petitioner notified Helms that, as of September 30, it was canceling the leases on the remaining trucks and terminating the agency agreement (*id.* at 68a). Helms acknowledged petitioner's action, and notified the 31 affected drivers that they were on layoff status as of the cancellation date (*ibid.*).

2. On a charge filed by Packer, a complaint issued alleging that petitioner, as the joint employer with Helms of the laid off drivers, had violated the Act by causing the layoff of Packer and the other drivers in retaliation for Packer's grievance and other protected activity. The complaint also named Helms as a respondent and alleged discriminatory layoffs by it. After commencement of the hearing, the ALJ, over petitioner's objections, approved a settlement of the complaint against Helms making Helms secondarily liable for any backpay remedy for the period from September 14 to September 30, the effective date of petitioner's cancellation of the lease/agency arrangement (Pet. App. 39a n.2,46a n.1).

The Board, in agreement with the ALJ, found that petitioner was a joint employer with Helms of the drivers of the leased trucks, and that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discriminatorily causing the layoff of Packer in retaliation for protected activity, and by causing the layoff of the drivers junior to him in order to reach Packer (Pet. App. 38a-39a, 45a-46a). In disagree-

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[2] Friction had developed in petitioner's relationship with Helms, and it further deteriorated during the summer of 1981 (Pet. App. 61a). Among the problems were Helms' solicitation of freight in petitioner's territory and its unilateral withholding of a portion of petitioner's lease rentals (*ibid.*). In addition, petitioner had directed drivers of the leased trucks to refuse Helms' loads in order to service Team Transport (*id.* at 54a-57a).

ment with the ALJ, the Board further found that the second round of layoffs was the result of petitioner's earlier unlawful conduct, and also violated the Act (*id.* at 76a-83a).[3]

In finding petitioner to be a joint employer, the Board noted that "the question of 'joint employer' status is a factual one and requires an examination into whether an employer who is claimed to be a 'joint employer' possessed sufficient control over the work of the employees to qualify as a joint employer with [the actual employer]" (Pet. App. 47a (citations omitted)). The Board found that, while it appeared from the formal arrangements between petitioner and Helms that Helms alone was the drivers' employer, a "closer look at [petitioner's] role in the day-to-day operations shows that it in very substantial degree controlled how the drivers performed their jobs, to the point of laying them off or firing them if [its] own standards were not met" (*id.* at 52a). The Board concluded that "[t]his control over dispatch and discipline [is] sufficient to render [petitioner] a joint employer with Helms" (*ibid.*). It further concluded that "Helms was an absent employer" (*id.* at 57a), and that "for all practical purposes the drivers who were nominally employed by Helms reported to and drove for [petitioner] * * * which could and did 'meaningfully affect' significant matters relating to their employment" (*id.* at 59a).[4]

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[3] The Board's supplemental decision so finding (Pet. App. 76a-83a) was issued after reconsideration, sua sponte, of its earlier decision (*id.* at 38a-39a), which had affirmed the ALJ's conclusion that the second round of cancellations was the result of a separate business decision (*id.* at 38a-39a, 70a).

[4] The Board noted that Phillip Rezzetano had told a driver who questioned petitioner's instructions to do work for Team Transport in violation of a contrary directive from Helms that the leased trucks " 'were his trucks * * * and nobody would tell him how to operate his

The Board rejected petitioner's contention that the truck leases would have been canceled in any event, because of the deterioration in its relationship with Helms during the summer of 1981. The Board found that while petitioner "was being provoked by Helms * * * the truck leases were [not] cancelled on 14 September for that reason. The provocation that caused the cancellations came from Packer, who was perceived in Phill[ip] Rezzatano's eyes as a troublemaker" (Pet. App. 64a). In such circumstances, the Board said, "it matters not * * * whether [petitioner] had it in mind to cancel some leases with Helms to focus attention on its problems. What does matter is that [petitioner] cancelled the lease on Packer's truck and 30 others in order to rid itself of a union activist" (*id.* at 65a).

Finally, the Board found that the September 24 cancellation of the remaining truck leases as of September 30 was a result of petitioner's prior unlawful actions and accordingly was unlawful, notwithstanding the absence of any evidence of specific discriminatory motivation for the second round of cancellations (Pet. App. 78a, 82a & n.9). The Board explained that, "while [petitioner's] relationship with Helms had become frayed even before the Packer grievance, there is nothing to indicate that absent the discriminatory 14 September layoffs, [petitioner] would not have continued the balance of the Helms leases to term." It concluded that, in these circumstances, the General Counsel had established that petitioner canceled

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vehicles * * * and he would get rid of anybody that stood in his way.' " It found that petitioner "in fact exercised actual daily control over working conditions that affected where the drivers would go, whether they could take certain loads (upon which their remuneration depended), and, above all, whether they would be working or laid off." It added that petitioner had the "power to cancel their trucks' leases, a power that it proved was not in the least theoretical." Pet. App. 56a.

the remaining truck leases as a result of its prior unlawful actions, and that those cancellations violated Section 8(a)(3) and (1), absent a showing by petitioner that they were caused by "an independent intervening event." Pet. App. 79a-80a. The Board observed that petitioner had failed to "point to any independent intervening event which can be relied on to fix the date [it] would have terminated its relationship with Helms had the Packer grievance not provoked the first round of cancellations," and that there was record evidence that the Packer grievance had "influenced and * * * accelerated" the termination (*id.* at 80a). Accordingly, the Board rejected petitioner's contention that the cancellations effective September 30 would have taken place on the same date "even in the absence of the Packer grievance and the first round of unlawful layoffs triggered by it" (*id.* at 81a).

As a remedy, the Board directed that the drivers laid off on September 14 and subsequently offered positions with Team Transport should be made whole for any loss of pay or benefits for the period from September 14, 1981, to December 31, 1982, the date petitioner's agreement with Helms would have expired by its terms (Pet. App. 40a, 82a-83a), and that the drivers laid off on September 30 be similarly made whole. With respect to Packer, the only driver not offered a position with Team Transport, the Board directed that he be offered employment with petitioner or Team Transport and be made whole for any loss of benefits resulting from his layoff and denial of employment (*id.* at 40a, 77a n.3).[5]

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[5] The Board noted that in the compliance stage of the proceeding petitioner could introduce evidence establishing that "factors other than the Packer grievance" would have resulted in the termination of some or all of the drivers before December 31, 1982, and thereby mitigate its backpay liability (Pet. App. 83a n.10).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 91a-95a). The court stated, in agreement with the Board, that the test of petitioner's status as a joint employer was whether petitioner, in fact, " 'possessed sufficient control over the work of the employees to qualify as a joint employer with the actual employer' " (*id.* at 93a). The court found ample support in the record for the Board's finding that petitioner was a joint employer, noting that petitioner "made the initial probationary hiring decisions, primarily controlled the drivers' day-to-day activities including acceptance of proffered loads, administered payroll, vacation and sick pay and at times accepted financial responsibility for union grievances brought against Helms" (*ibid.*).

The court further concluded that the Board's finding that the layoffs and cancellations were in retaliation for Packer's grievance was supported by substantial evidence (Pet. App. 94a). It also found that substantial evidence supported the Board's conclusion that the first round of layoffs was the "catalyst" for the second round. It agreed with the Board that "there were no independent, intervening events which might point to a non-discriminatory rationale for the further cancellations" (*ibid.*), and that, accordingly, those cancellations shared the discriminatory taint of the earlier cancellations, and also violated the Act.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner acknowledges (Pet. 7) that in *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964), this Court established that the test of joint employer status is whether the alleged joint employer "possessed sufficient control

over the work of the employees to qualify as a joint employer with" the actual employer, and that the determination is "essentially a factual issue." Petitioner contends (Pet. 7-13) that the *Boire* v. *Greyhound* analysis was improperly applied here because, unlike the general contractor there, who had the power to control the employment relationship, it "was compelled to observe the policies dictated by Helms Express" (Pet. 9).

That argument simply takes issue with the Board's findings, upheld by the court of appeals, that, although its formal arrangement with Helms indicated that Helms alone was the drivers' employer, petitioner, in fact, "exercise[d] 'substantial * * * [control over] how the drivers performed their jobs" (Pet. App. 52a), " 'meaningfully affect[ed] significant matters relating to their employment,' " and exercised sufficient control to qualify as their joint employer (id. at 59a). Petitioner's fact-based contentions do not merit further review. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951); see *Beth Israel Hospital* v. *NLRB,* 437 U.S. 483, 507 (1978).[6] In any event, the Board's finding that petitioner required the drivers, on pain of discharge, to conform to its own standards and instructions, and to do so even when those instructions were contrary to Helms' interests and directives, are amply supported by the record.

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[6] Petitioner's assertion (Pet. 9) that "[t]he minimal discretion [it] exercised [] fell far short of that exercised in many cases where the Board and the courts have declined to find joint employer status" is simply an attack on the Board's finding that petitioner exercised actual daily control over the drivers' working conditions and required them to adhere to its own rules (Pet. App. 56a). None of the cases cited by petitioner (Pet. 9-10) conflicts with the Board's conclusion here if one accepts the Board's factual findings rather than petitioner's allegations. In *Laerco Transportation & Warehouse,* 269 N.L.R.B. 324, 326 (1984), the Board found that, while the alleged joint employer ex-

2. Petitioner no longer disputes that it discriminatorily canceled the leases of Packer and the 30 drivers junior to him, resulting in their layoffs on September 14. However,

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ercised "minimal" and "extremely routine" supervision over the disputed employees, all "major problems relating to the employment relationship [were] referred back to [their actual employer] for resolution." Similarly, in *United States Steel Corp.*, 270 N.L.R.B. 1318, 1319 (1984), the Board found that the alleged joint employer did not share in employee hiring or payroll distribution and did not establish employee work rules. While the facts in *Kaylor* v. *Crown Zellerbach, Inc.*, 643 F.2d 1362 (9th Cir. 1981), are analogous to the formal arrangements between Helms and petitioner, which on their face make Helms the sole employer (see Pet. App. 52a), there was no evidence in *Crown Zellerbach* that the alleged joint employer, in fact, exercised substantial independent control. In *Ace Doran Hauling & Rigging Co.* v. *NLRB*, 462 F.2d 190, 194 (6th Cir. 1972), the court held, in light of the "total factual context," that drivers of leased trucks were the employees of the lessor who had sole power to hire and fire the drivers, fixed their rates of pay and working conditions, withheld Social Security and income tax from their pay, and, on occasion, assigned them to perform work in its own independent operations. The very different total factual context here includes petitioner's insistence that its interests determined whether a driver could accept a load, even at the cost of loss of pay to the driver and disobedience to Helms' instructions (see Pet. App. 54a-57a).

Petitioner's reliance (Pet. 11-12) on *Howell and Van Schaak & Co.*, 95 N.L.R.B. 1028, 1029 (1951), for the proposition that its relationship to Helms was properly one of agent and principal again merely takes issue with the Board's finding that petitioner maintained actual control over important aspects of the employment relationship; the Board found no such control by the management agent in finding sole employer status of the building owners in *Howell*. *NLRB* v. *Schroeder*, 726 F.2d 967 (3d Cir. 1984), and *The Huntington Hospital, Inc.*, 229 N.L.R.B. 253, 255 (1977), are also inapposite; those cases dealt with the agency status of supervisory employees of an employer and raised no joint employer issue. *Teamsters & Auto Truck Drivers, Local No. 85*, 253 N.L.R.B. 632 (1980) (per curiam), is similarly inapposite, since it involved the separate test for single employer status (see *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965)), which has no application here.

petitioner contends (Pet. 21-28) that the Board erred in finding that the September 30 cancellations were unlawful. This contention also raises only an evidentiary issue that does not warrant review by this Court.

Petitioner asserts (Pet. 21-24) that the General Counsel never made out a prima facie case of a discriminatory motive for the September 30 lease cancellations and improperly shifted the burden of proof to petitioner to establish that those cancellations were not improperly motivated. However, the Board found on the evidence in the record, including testimony by petitioner's owner, that the second round of layoffs was *not* independent of the unlawfully motivated first round, but was "precipitated" by petitioner's prior unlawful actions (Pet. App. 79a-81a), and the court of appeals affirmed the Board's finding as supported by substantial evidence (*id.* at 94a-95a). The burden then properly shifted to petitioner to prove that it would have canceled the lease/agency arrangement when it did in the absence of Packer's grievance and other protected activity, which petitioner failed to do.[7]

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[7] Contrary to petitioner's contention (Pet. 21-22), the decision here is consistent with the Board's decision in *Wright Line, Inc., a Division of Wright Line,* 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), and with this Court's decision in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983). Under the *Wright Line* test for unlawful motivation, once the General Counsel shows that an employer's hostility to protected activity was a motivating factor in a discharge decision, a violation of the Act is established unless the employer proves, as an affirmative defense, that it would have taken the same action in the absence of protected activity.

The cases cited by petitioner (Pet. 24-26) are not inconsistent with the instant decision. In *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), the court of appeals, concluding that the Board's findings were not supported by substantial record evidence, found that the employer's decision to relocate had been made for lawful business

3. There is no merit to petitioner's additional contention (Pet. 13-21) that the Board improperly approved a settlement with Helms with the result that petitioner is primarily responsible for backpay until the cancellation of the lease arrangement with Helms on September 30, 1981, and solely liable for backpay from that date until December 31, 1982, the date the lease/agency arrangement would have expired had petitioner not canceled it.[8] Helms

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reasons and that its acceleration as a result of intervening union activity did not render the lawfully made relocation decision unlawful. In *NLRB* v. *Lassing*, 284 F.2d 781 (6th Cir. 1960), cert. denied, 366 U.S. 909 (1961), the court found that the employer had decided for sound business reasons to change its method of operations as soon as anything occurred that would increase its costs, and that implementation of the decision was not unlawful because the new economic factor was union activity that the employer reasonably believed would raise its operating costs. Similarly, in *NLRB* v. *Houston Chronicle Pub. Co.*, 211 F.2d 848, 852-853 (5th Cir. 1954), the court found that the employer's basic decision to switch to deliveries by independent contractors as soon as possible had been economically motivated, and that its employees' subsequent efforts to organize in an effort to prevent the change did not affect the lawfulness of the implementation. By contrast, in this case the Board found no credible evidence that, absent the unlawful motivation that produced the first round of layoffs, petitioner would have terminated the lease/agency arrangement, and the court of appeals agreed with the Board.

[8] Contrary to petitioner (Pet. 14), the decision below is not contrary to *NLRB* v. *United Food & Commercial Workers Union, Local 23*, No. 86-594 (Dec. 14, 1987). There the Court held that a prehearing informal settlement to which the charging party had not agreed was an exercise of the General Counsel's prosecutorial discretion and thus not subject to judicial review, while stating that a settlement following commencement of a hearing would be reviewable under the Board's rules. There is no issue presented as to the reviewability of the General Counsel's settlement with Helms. Petitioner's contention is that, in light of the settlement, it should not be held responsible, or primarily responsible, for affirmatively remedying the unfair labor practices found, and that contention was reviewed and rejected by both the Board and the court of appeals.

and petitioner, as joint employers, could have been jointly and severally liable for any unfair labor practices found in a proceeding in which both participated as respondents, but Helms avoided litigation and limited its liability by entering into a settlement agreement with the Board. Contrary to petitioner's assertion (Pet. 17-21), the Board is not precluded from proceeding against only one among several wrongdoers. Cf. *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 52-55 (1954) (absence of joinder of employer for violation of Section 8(a)(3) of the Act does not preclude entry of backpay order against union for parallel violation of Section 8(b)(2)).[9]

Petitioner's further contention (Pet. 13-19) that, in the circumstances here, it was unfair for the Board to hold it primarily liable for the backpay award because Helms was the "true wrongdoer[]" (Pet. 14) is simply another attack on the Board's findings. The Board properly concluded, as the court of appeals held, that petitioner had caused the drivers' layoff in retaliation for the filing of Packer's grievance and that the record evidence, including evidence suggesting anti-union animus of Helms, established that

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[9] Contrary to petitioner (Pet. 17-18), *Ref-Chem Co.*, 169 N.L.R.B. 376 (1968), enforcement denied on other grounds, 418 F.2d 127 (5th Cir. 1969), and *Drapery Mfg.*, 166 N.L.R.B. 805 (1967), do not support the contention that the Board may not settle with one joint wrongdoer and proceed against another. In *Ref-Chem*, the Board held that a charge against one joint employer constituted a charge against another joint employer (169 N.L.R.B. at 380); it did not hold that the General Counsel could not accept a settlement from one joint employer. In *Drapery*, the Board simply held that, where two respondents were "a single, integrated employer who have jointly and severally violated [the Act] as established by the record," it was inappropriate for the administrative law judge to order affirmative remedial relief against only one respondent (166 N.L.R.B. at 805). Again, there was no settlement in *Drapery*.

petitioner and not Helms was responsible for the layoffs (Pet. App. 65a-68a).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

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[10] The Board acknowledged that Helms' initial refusal to hire Packer created a suggestion of anti-union animus on its part (Pet. App. 66a), but rejected petitioner's contention that Helms, not it, was responsible for the layoffs because Helms could have employed the affected drivers on other trucks leased from fleet owner Robert Short and operating out of the Warrenburg terminal. The Board found that the number of trucks leased to Short was substantially less than the number of drivers affected by the cancellations, that Helms did not have sufficient confidence in Short to have him take over the Warrendale operation, and that petitioner's cancellation of the agency agreement led to "slack at the Emeryville terminal." *Id.* at 65a-68a.

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